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Posthumous Children, Hegemonic Human Rights, and the Dilemma of Reform – Conversations Across Cultures

*Uché Ewelukwa**

I. INTRODUCTION

Mr. Nnanyelugo Nnebechi Okonkwo (Okonkwo), a native of Onitsha, a town in southeastern Nigeria, died in 1931.¹ During his lifetime, Okonkwo had five male children.² Thirty years after Okonkwo's death, his sisters, acting purportedly under Onitsha native law and custom, married a wife (*X*) on his behalf.³ *X* gave birth to six children who all bear Okonkwo's name.⁴ In a case that was fought all the way to the Nigerian Supreme Court (Supreme Court), the central questions before the Supreme Court were whether the living can legally contract a marriage on behalf of the dead and whether a man can procreate thirty years after his death.⁵ Drawing on the repugnancy test, an inherited colonial principle, the Supreme Court held that the custom which allowed marriage on behalf of the dead was repugnant to natural justice, equity, and good conscience and therefore unenforceable.⁶

In many parts of Africa, customary law recognizes the legality of posthumous procreation. By means of numerous forms of arrangements, including levirate marriage, ghost marriage, and woman-to-woman marriage, a dead man can become the legal father of children sired by another man long after his death. However, age-old practices have come under attack from courts in Africa and from international human rights

* Associate Professor, University of Arkansas School of Law. I would like to express my thanks to Barrister Emeka Ewelukwa, Esq. for bringing the Nigerian Supreme Court decisions in *Okonkwo v. Okagbue* and *Muojekwu v. Ejikeme* to my attention and for reading earlier drafts of this paper. These two cases prompted my desire to analyze the issue of posthumous reproduction in Africa and to examine the relationship between culture and international human rights norms. This Article is a preliminary attempt to address two issues that both deserve much deeper analysis.

1. *Okonkwo v. Okagbue* and 2 Others, [1994] 12 N.S.C.C. 40 (Nig.).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

advocates. Drawing on two related but distinct sources — the repugnancy principle and international human rights norms — courts have invalidated customs pertaining to posthumous procreation. Some international human rights bodies have also expressed concern about the human rights implications of some of the practices.

At first blush, posthumous procreation African style (PPAS) seems primitive at best. At worst, PPAS may be considered repugnant to public policy, public morality, and public health. However, problems arise when African customs are evaluated through the lens of Western laws and values. Unforeseen difficulties arise when attempts are made to abruptly and hastily discard longstanding rules and regulations that govern a society. Forced or hasty abolition of entrenched customary rules sometimes results in further violation of human rights. Problems also arise when practices in non-Western societies are condemned while arguably comparable practices in the West are ignored or even promoted. In this respect, a critical and penetrating look at posthumous procreation in the West using new assisted reproductive technologies (ART) unearths many complex and troubling issues that arguably deserve urgent attention.⁷ The application of cryogenetics to human sperm now makes it possible not only to retrieve sperm from dead men, but also to use the gamete retrieved in subsequent assisted reproduction.⁸ Although posthumous retrieval, storage, and use of sperm in assisted reproduction arguably raises many troubling ethical, moral and legal issues, no human rights body has passed judgment on the practice. What is evident, one could argue, is a biased approach to human rights work and a double standard in international human rights discourse. Unless carefully deployed, international human rights law could increasingly be viewed as a vehicle for delegitimizing non-Western customs and imposing Western values on non-Western societies.⁹

7. American Society for Reproductive Medicine, *Posthumous Reproduction*, 67 Supp. 82 FERTILITY AND STERILITY S260, S261 (1997), available at <http://www.asrm.org/Media/Ethics/posthumous.pdf>. A statement developed by the American Society for Reproductive Medicine's Ethics Committee and accepted by the Board of Directors on January 10, 1997 notes that "posthumous reproduction raises more ethical, practical, and legal questions for physicians practicing reproductive medicine and the public" *Id.*

8. The idea of freezing sperm has been experimented with since the late 1700s. However, the technology for the effective freezing of sperm became available only around the middle of the twentieth century. See Andrology (University of Utah), *Treatment Options: Sperm Freezing (Cryopreservation)*, <http://www.utahhealthsciences.net/pageview.aspx?id=16666> (last visited Apr. 13, 2008) (observing that it was not until fifty years ago that human sperm were capable of being frozen, and later thawed in such a way that they could fertilize an egg and initiate development). Today, cryopreservation of sperm is widely available, at least in industrialized countries. There are several reasons why people choose cryopreservation including vasectomy and treatment of malignant disease. Although vasectomies can be surgically reversed, success is never guaranteed, surgery is most often expensive, and "after an initially successful reversal, the ducts through which the sperm travel often develop scar tissue and become obstructed." *Id.* The chemotherapeutic agents and radiation therapy used to treat diseases such as Hodgkin's disease, leukemia, testicular cancer, and other malignancies also affect the production of sperm. *Id.*

9. Elisabetta Grande, *Hegemonic Human Rights and African Resistance: Female*

In the final analysis, the appeal to international human rights norms does not always yield optimal outcomes. The challenge for Africans is to find ways to ensure periodic review and revision of customary laws and practices that do not entail the devaluing of whole cultures. The challenge for human rights advocates is to move towards a genuinely universal approach to human rights work — an approach that calls for communication among cultures and a single, not double, standard in evaluating practices in diverse cultures.

This Article focuses on the unequal treatment of PPAS and what I call posthumous procreation Western style (PPWS) in human rights discourse. It seeks answers to a number of questions: Does this unequal treatment demonstrate ethnocentrism, hypocrisy, or ignorance? Does the unequal treatment reflect fundamental transcultural differences in the approaches to posthumous conception and reproduction or a misunderstanding of unfamiliar practices? This Article neither justifies nor condemns PPAS. Equally, this Article neither justifies nor condemns PPWS; it simply seeks to shed light on similarities in practices across cultures and civilizations — similarities that are apt to be ignored by international human rights bodies and human rights activists. It is hoped that this Article will prompt genuine cross-cultural dialogue on implications of posthumous reproduction for all children. By highlighting the limitations of international human rights law in addressing complex issues that arise in diverse cultures and the dilemma that human rights advocates face in attempting to eradicate age-old customs and practices, it is also hoped that this Article will foster debate on alternative approaches to reforming questionable customary laws and practices — approaches that do not involve the delegitimization of whole cultures. This Article calls for caution in the application of the repugnancy test in contemporary Africa and for utmost care in the deployment of international human rights norms from the top in any effort to abolish longstanding customary rules and practices in non-Western societies.

Posthumous procreation is not to be confused with posthumous birth. Posthumous birth dates back to antiquity and occurs when a husband or male partner dies after conception and pregnancy but before the child is born. Posthumous procreation, on the other hand, arises in a situation where conception, pregnancy, and birth occur after the death of a husband or male partner. While posthumous birth presents few, if any, legal or ethical problems, posthumous procreation raises numerous ones. This Article is concerned with posthumous procreation.

II. POSTHUMOUS PROCREATION AFRICAN STYLE

This section briefly reviews unconventional arrangements through which men have traditionally been able to have children posthumously among various African ethnic groups, including the Igbo of Nigeria, and the Nuer and Dinka of Sudan.

A. CHILDREN THROUGH UNCONVENTIONAL ARRANGEMENTS

To continue the family line of descent, there are at least four ways that children born posthumously can be attributed to a deceased among these ethnic groups: (1) the levirate marriage; (2) the woman-to-woman marriage; (3) ghost marriage; and (4) the *nwunye nrachi* custom.¹⁰ Common in all four situations is the fact that children resulting from these arrangements do not belong to their biological fathers even if the biological father is alive. In all four cases, the resulting children are attributed to a deceased person for purposes of inheritance and legitimacy. Although with modernization and the shift to monogamy the various arrangements described have fallen into serious disuse, the practices continue to some degree in some parts of Africa.

1. Levirate Marriage

Among some ethnic groups, a widow may be inherited by her husband's brother or other surviving male relative.¹¹ This is frequently the case when a man dies without a male issue.¹² Because the previous marriage was not considered terminated by death, it continues through marriage to a relative of the deceased.¹³ Children born to the union are considered children of the widow's dead husband.¹⁴ The rights of the inheritor are limited.¹⁵ His primary function is procreation and to provide security for the widow and her children.¹⁶ This tradition is practiced in various parts of Africa.¹⁷ Levirate marriage, known as *Yibbum*, was also known in ancient Israel.¹⁸ The great-grandmother of King David, Ruth,

10. See, e.g., Celestine A. Obi, *Marriage Among the Igbo of Nigeria*, <http://www.afrikaworld.net/afrel/igbo-marriage.htm> (last visited Apr. 13, 2008) (discussing levirate marriage (also called "Nwunye Nkuchi"), woman-to-woman marriage, ghost marriage and Nwunye Nrachi (also called Nwunye Nhachi) among the Igbo people).

11. C.K. MEEK, *LAW AND AUTHORITY IN A NIGERIAN TRIBE* 321 (Oxford University Press 1937) (observing that among some groups widows are inheritable and may become wives of brothers or sons of the deceased. In the later case, the son inherits the widow who is not his own mother).

12. *Id.*

13. Obi, *supra* note 10, at 7.

14. See, e.g., Atem Yaak Atem, *Dinka marriage customs at crossroads*, SUDAN MIRROR, Mar. 15-28, 2004, available at <http://list.msu.edu/cgi-bin/wa?A2=ind0511a&L=sudanese&P=4047>.

15. *Id.*

16. *Id.*

17. *Id.*; Obi, *supra* note 10, at 7.

18. Raphael Cohen-Almagor, *Israeli Democracy, Religion, and the Practice of*

was inherited by Boaz, a relative of her late husband, Mahlon.¹⁹ Indeed it was a duty of a man to marry his brother's widow if his brother died without a son.²⁰ A brother-in-law who refused to marry his brother's widow brought disgrace upon himself and his family.²¹ The full commandment is spelled out in the Book of Deuteronomy 25:5-6:

If brothers dwell together, and one of them dies and has no son, the wife of the dead shall not be married outside the family to a stranger; her husband's brother shall go in to her, and take her as his wife, and perform the duty of a husband's brother to her. And the first son whom she bears shall succeed to the name of his brother who is dead, that his name may not be blotted out of Israel.²²

It must be noted that the Holy Bible provided an escape clause for individuals not wishing to go through the levirate marriage. The ceremony by which a widow and her husband's brother could avoid the duty to marry after the husband's death is known as Halizah or Chalitza.²³ According to Deuteronomy 25:7-10:

[I]f the man does not wish to take his brother's wife, then his brother's wife shall go up to the gate to the elders, and say, "My husband's brother refuses to perpetuate his brother's name in Israel; he will not perform the duty of a husband's brother to me." Then the elders of his city shall call him, and speak to him: and if he persists, saying, "I do not wish to take her," then his brother's wife shall go up to him in the presence of the elders, and pull his sandal off his foot, and spit in his face; and she shall answer and say, "So shall it be done to the man who does not build up his brother's house." And the name of his house shall be called in Israel, The house of him that had his sandal pulled off.²⁴

2. Woman-to-Woman Marriage

The woman-to-woman marriage is a practice whereby a widow who is infertile or too old to conceive marries another woman on behalf of her dead husband.²⁵ An infertile woman would go to such lengths for at least

Haliza in Jewish Law, 11 U.C.L.A. WOMEN'S L.J. 45, 59 (2000-2001).

19. *Ruth* 3:9.

20. *Deuteronomy* 25:5-6.

21. *Id.* at 25:7-11.

22. *Id.* at 25:5-6.

23. Cohen-Almagor, *supra* note 18, at 59.

24. *Id.*

25. Marriage Rules: Part II, http://anthro.palomar.edu/marriage/marriage_4.htm (last visited Apr. 13, 2008) (discussing the practice of woman-to-woman marriage among the Nuer tribe of East Africa).

two reasons: First, to strengthen her position in her husband's family, since without a child, a woman's status in her marital home is uncertain at best; second, to remove the curse of infertility.²⁶ This is not a lesbian relationship.²⁷ Usually a "secret" lover is found to impregnate the wife.²⁸ Any resulting children bear the name of the widow's deceased husband.²⁹ The widow raises the children for her husband by proxy and becomes the socially recognized "father" of the children born.³⁰ The practice has been noted in many parts of Africa.³¹

3. Ghost Marriage

A ghost marriage occurs when an unmarried man dies without a male heir.³² In order to ensure that his family line does not die out, relatives may decide to marry a woman to the name of the dead man.³³ A secret lover is then found to impregnate the woman.³⁴ In some cases the lover may be a relative of the dead man.³⁵ The secret lover stands in for the dead man.³⁶ Children born of this marriage bear the name of the dead man.³⁷ The dead man (the Ghost) is the socially recognized father of the children.³⁸ The children are the legally recognized descendants of the dead man.³⁹ This practice occurs in Igboland and has also been noted in other African societies.⁴⁰

26. See Obi, *supra* note 10, at 7.

This [woman-to-woman marriage] may be described as the devise whereby a sterile woman tries to render her supreme service to society, thereby strengthening her position as a useful and responsible member of her husband's family. She pays for a new life on behalf of her husband, or she provides him with the necessary funds for a new marriage, with a view to raising children for her husband by proxy as we may put it.

Id.

27. Marriage Rules: Part II, *supra* note 25.

28. *Id.*

29. *Id.*

30. *Id.* See also Obi, *supra* note 10, at 7.

31. Obi, *supra* note 10, at 7.

32. *Id.* ("Ghost marriage . . . consists in a woman being married to the name of a man who died unmarried so that his line need not die out.").

33. Marriage Rules: Part II, *supra* note 25.

34. *Id.*

35. *Id.*

36. See *id.*

37. *Id.*

38. *Id.*

39. Obi, *supra* note 10, at 7.

40. Atem, *supra* note 14 (observing that the practice occurs among the Dinka in Sudan but is coming under attack in the wake of the HIV/AIDS pandemic). See also Obi, *supra* note 10, at 7.

4. Nwunye Nrachi

Nwunye Nrachi occurs in situations where a man dies without a male heir but with daughters of marriageable age.⁴¹ One of the daughters may be persuaded to remain unmarried but nevertheless beget children on behalf of her dead father.⁴² The goal is to produce male heirs.⁴³ The children, thus raised, are legally those of the woman's dead father and inherit his property.⁴⁴ After the Nrachi ceremony is performed on a daughter, "she takes the position of a man in [her] father's house."⁴⁵ Technically, she becomes a "man."⁴⁶ She must stay unmarried for the rest of her life to produce male children for her father.⁴⁷ Nwunye Nrachi, thus, gives a woman freedom to procreate outside the bounds of marriage in the name of her father.⁴⁸ It must be stressed that no incest is involved and usually the woman in question finds a "secret" lover with whom to biologically conceive the children.⁴⁹ No empirical study has been conducted to determine if female children are coerced by their father, prior to his death, into accepting the Nrachi custom.

In order to deal with the frustration of premature male death and ensure societal survival, ethnic groups in Africa have devised various mechanisms through which children may be attributed to a man long after his death. The result of the arrangements described was, and still is, the preservation of the "name" of the departed. A man's name is preserved only with the provision of a male heir to inherit his property and ensure that the property is kept in the family and in the normal line of inheritance. Even in the absence of any specific marriage arrangement, children born to a widow after the death of her husband are regarded as children of the deceased husband if the widow remains unmarried, remains in her late husband's home, and her dowry is not returned.⁵⁰

B. THE NATURE OF CUSTOMARY LAW

In *Oyewunmi v. Ogunesan*, the Nigerian Supreme Court defined customary law as "the organic living law of indigenous people of Nigeria regulating their lives and transaction."⁵¹ The Supreme Court has also defined it as "any system of law not being the common law and not being a

41. Obi, *supra* note 10, at 7.

42. Muojekwo & Ors. v. Ejikeme & Ors., [1999] 5 N.W.L.R. 402 (Nig.), summaries available at <http://www.worldlii.org/cgibin/disp.pl/int/cases/ICHL/1999/168html?query=muojekwo>.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *See id.*

50. MEEK, *supra* note 11, at 321-22.

51. *Oyewunmi v. Ogunesan*, [1990] 3 N.W.L.R. (Part 137) 207 E – F (Nig.).

law enacted by any competent legislature in Nigeria but which is enforceable and binding within Nigeria as between the parties subject to its sway.”⁵² In essence, customary law is an evolutionary, non-prescriptive system of law and depends largely on the assent of the people governed by it.⁵³ As the Privy Council once observed, “[i]t is the assent of the native community that gives a custom its validity, and, therefore, barbarous or mild, it must be shown to be recognised by the native community whose conduct it is supposed to regulate.”⁵⁴ The fact that every native custom challenged in court must pass the repugnancy test casts a shadow on the claim that the validity of customary law depends on popular assent.⁵⁵

How is a custom proved in a court of law? In Nigeria, the answer is found in Section 14 of the Evidence Act, which provides two ways to establish the existence of a custom.⁵⁶ First, a custom may be judicially noticed.⁵⁷ The court may take judicial notice of the custom

if it has been acted upon by a court of superior or co-ordinate jurisdiction in the same area to an extent which justifies the court asked to apply it in assuming that the persons or the class of persons concerned in that area look upon the same as binding in relation to circumstances similar to those under consideration.⁵⁸

Second, a custom may be adopted as part of the law governing particular circumstances “by calling evidence to show that persons or the class of persons concerned in the particular area regard the alleged custom as binding upon them.”⁵⁹ Customary law is therefore a question of fact that must be duly established by any party asserting its existence.⁶⁰

52. John Ademola Yakubu, *Colonialism, Customary Law and the Post-Colonial State in Africa: The Case of Nigeria*, 30 AFR. DEV. No. 4, 201, 209 (2005) (citing Ohai v. Akpemonye, [1991] S.C.N.J. 77 (Nig.), and Zaiden v. Mohssen, [1973] 11 S.C. 1 (Nig.)).

53. *Id.*

54. Eshugbayi Eleko v. Officer Administering the Gov't of Nig., [1931] A.C. 662 (Nig.).

55. Derek Asiedu-Akrofi, *Judicial Recognition and Adoption of Customary Law in Nigeria*, 37 AM. J. COMP. L. 571, 586 (1989) (observing “[t]hus, the validity of customary law no longer depends solely on the assent of the community but also to a lesser extent on the opinion of the judge, applying the repugnancy test.”).

56. Evidence Act, (1990) Cap. (112), 14(2), (3) (Nig.).

57. *Id.* at 14(2).

58. *Id.*

59. *Id.* at 14(3).

60. See Yakubu, *supra* note 52, at 202 (stating that “[c]ustomary law . . . is a matter of evidence to be decided on the facts presented before the court in each case. Indeed, customary law is a question of fact which must be proved by evidence if judicial notice is not available through decided cases of the superior courts.” (citing Ifabiye v. Adeniyi, [2000] 5 S.C.N.J. 1, 11)). See also *id.* at 216 (stating that “[a]s in the case with all customary law, it has to be proved in the first instance by calling witnesses acquainted with the native law and customs until the particular customs by frequent proof in the courts have become so notorious that the courts will take judicial notice of them.” (citing Angu v. Attah, [1916] Gold Coast P.C. Judgments 1874-1928, 43, 44)).

C. CONCLUSION

An appreciation of the importance of lineage, marriage, and children in patrilineal and patrilocal societies is critical to an understanding of the custom of marriage on behalf of the dead among ethnic groups in Africa. Among the Igbo, for example, marriage occupies a very important place in the social economy of the tribe.⁶¹ Marriage is considered “an indispensable factor for the continuation of the family line of descent.”⁶² Considered an alliance between two families rather than a contract between two individuals, an Igbo marriage is not necessarily terminated by death.⁶³ Children are central to any marriage⁶⁴ and male children are highly regarded. Inheritance is based on the male lineage and men control wealth and property.⁶⁵ A man can perpetuate his name and that of his clan only by having male children who bear his name.⁶⁶ As Victor Uchendu rightly notes, “[t]o have a male child is to strengthen both the social and the economic status, for it is the male child who inherits the father’s property.”⁶⁷ He notes further that “[a] woman — and worse still, a man — who has no male child contemplates old age with particular horror.”⁶⁸

To appreciate the ready acceptance of posthumous procreation among ethnic groups in Africa, an understanding of the concept of social parenthood is also called for. In times past, customary law, in most parts of Africa, recognized that it is possible for many people, besides the biological parents, to have some sort of connection with a child and allocated different powers and responsibilities to these people.⁶⁹ Customary law accorded some form of recognition to persons performing the social role of parenting even in the absence of a genetic link.⁷⁰ Legal parenthood did not automatically follow genetic parentage.⁷¹ Therefore, the absence of such a genetic connection did not prevent recognition as a legal parent.⁷² Overall, there was and still is much fluidity in Africa

61. Obi, *supra* note 10, at 1.

62. *Id.*

63. VICTOR C. UCHENDU, *THE IGBO OF SOUTHEAST NIGERIA* 50 (Holt, Rinehart & Winston 1965) (observing that death does not terminate the marriage alliance in Igboland).

64. Obi, *supra* note 10, at 1.

65. UCHENDU, *supra* note 63, at 57.

66. *Id.*

67. *Id.*

68. *Id.*

69. WORLD SCRIPTURE: A COMPARATIVE ANTHOLOGY OF SACRED TEXTS, TRUE PARENTS ORGANIZATION (Andrew Wilson ed., Paragon House 1991), selections *available at* <http://www.tparents.org/Library/Unification/Books/World-S/WS-04-02.htm>.

70. Yakubu, *supra* note 52, at 210 (citing *Ejanor v. Okenome*, “according to Ishan customary law, the paternity of a child born by a wife at a time when the customary marriage had not been dissolved by the refund of dowry paid belonged to the husband even though he was not the biological father.”).

71. *Id.*

72. *Id.*

surrounding the definition of parenthood and the characteristics of fatherhood. As the court observed in the 1949 case of *The Estate of Agboruja*:

[T]he custom by which a man's heir is his next male relative, whether brother, son, uncle, or even cousin, is widespread throughout Nigeria. When there are minor children it means that the father's heir becomes their new father. This is a real relationship and the new fathers regard the children as their own children. Whenever this custom prevails, native courts follow it⁷³

III. JUDICIAL RESPONSE TO POSTHUMOUS PROCREATION IN AFRICA

Over the years, Nigerian courts have directly as well as indirectly concluded that the various customary practices relating to posthumous procreation are invalid and unenforceable.⁷⁴ By declaring ghost marriages, levirate marriage, woman-to-woman marriage, and the Nrachi custom to be repugnant to natural justice, equity, and good conscience, the courts are effectively closing the door to the inexpensive, traditional, and community-sanctioned approaches to posthumous reproduction in Africa.

A. BACKGROUND TO THE REPUGNANCY PRINCIPLE

European contacts with Africa during the colonial period "resulted in the existence of at least two legal systems — the imported and the indigenous — each applied in the main by an almost entirely separate system of courts."⁷⁵ First, ordinances were passed legitimating the application of English Law including the common law, the doctrines of equity, and the statutes of general application.⁷⁶ Second, special provisions were made for the courts to continue to apply customary laws.⁷⁷ Third, rules of evidence were adopted to provide for proof of customary law in the courts.⁷⁸ During the colonial period, therefore, British-established courts were required to administer native laws and customs.⁷⁹ From the

73. Yakubu, *supra* note 52, at 211 (citing *The Estate of Agboruja*, [1949] 19 N.L.R. 38 (Nig.)).

74. See Section III. B. of this Article.

75. W.C. Ekow Daniels, *The Interaction of English Law with Customary Law in West Africa*, 13 INT'L & COMP. L.Q. 574, 574 (1964).

76. See SUPREME COURT ORDINANCE § 14 (1914) (Nig.) ("[T]he common law, the ordinance of equity, and the statutes of general application which were in force in England as at January 1, 1900 shall be in force within the jurisdiction of the court."). See also Yakubu, *supra* note 52, at 202 (citing GHANA, SUPREME COURT ORDINANCE No. 4, § 14 (1876)).

77. See generally F. A. Ajayi, *The Interaction of English Law with Customary Law in Western Nigeria: II*, 4 J. AFR. L. 98 (1960).

78. *Id.* at 99.

79. *Id.* at 98 ("The High Court is further required by s.17 (4) to apply 'the particular

beginning, the question was whether the court should administer strict and undiluted customary law. The repugnancy principle was imported into Africa and became the standard by which African laws and customs were evaluated.⁸⁰ Colonial courts⁸¹ and native courts⁸² were both empowered to apply the repugnancy test.

Today, a series of inherited colonial laws allows courts to continue to apply the repugnancy principle.⁸³ For example, section 13(1) of the Mid-Western State High Court Law No. 9 of 1964 states that

[t]he High Court shall observe and enforce the observance of every customary law which is applicable and is not repugnant to natural justice, equity and good conscience, nor incompatible either directly or by implication with any written law for the time being

customary law which is appropriate' in each case, having regard to the provisions of s.20 of the Customary Courts Law, 1957."). Ajayi, *supra* note 77, at 98.

80. See generally Yakubu, *supra* note 52, at 203-04 (citing THE SUPREME COURT ORDINANCE No. 11 (1863) (Nig.); Native Court Proclamation No. 9 (1900) (Nig.); Native Court Proclamation No. 25 (1901) (Nig.); and THE SUPREME COURT ORDINANCE § 20 (1914) (Nig.)). All these statutes made provisions for the application of customary law subject to the satisfaction of the repugnancy test. The use of the repugnancy test is not limited to Nigeria. A Gambia law provided:

Nothing in this Ordinance shall deprive the courts of the right to observe and enforce the observance, or shall deprive any person of the benefit, of any law or custom existing in Gambia, such law or custom not being repugnant to natural justice, equity and good conscience, nor incompatible either directly or by necessary implication with any law, for the time being in force.

Daniels, *supra* note 75 (citing Gambia, Ordinance 3, § 5 (1955) (Laws of the Gambia, 1955 Rev.)).

81. Nonso Okereafoezeke, *Judging the Enforceability of Nigeria's Native Laws, Customs, and Traditions in the Face of Official Controls*, Paper presented at the Southeastern Regional Seminar in African Studies (Apr. 6-7, 2001), available at <http://www.ecu.edu/african/sersas/Papers/OkereafoezekeN28Mar01.htm> (citing Proclamation No. 6 of 1900 (Nig.)). This law was enacted to consolidate British rule over Nigeria and remains a part of the Nigerian justice system.

82. Native courts were established for the Colony and Protectorate of Lagos to the Native Court Proclamation No. 9 of 1900 (Nig.). Yakubu, *supra* note 52, at 204. This statute was replaced by subsequent statutes including the Native Courts Proclamation No. 25 of 1901 (Nig.) and the Native Courts Proclamation No. 7 of 1906 (Nig.). *Id.* See also Daniels, *supra* note 75, at 574-75 (citing Western Nigeria Customary Courts Law, No. 26 (1957) (Nig.); Sharia Court of Appeal Law, 1960, N.R. No. 16 (1960) (Nig.)).

83. Yakubu, *supra* note 52, at 208 (citing section 14 subsection (3) of the Evidence Law, Cap. 49 of the Laws of Eastern Nigeria 1963), which provides:

Where a custom cannot be established as one judicially noticed it may be established and adopted as part of the law governing particular circumstances by calling evidence to show that persons or the class of persons concerned in the particular area regard the alleged custom as binding upon them: Provided that in the case of any custom relied upon in any judicial proceeding it shall not be enforced as law if it is contrary to public policy and not in accordance with natural justice, equity and good conscience.

in force, and nothing in this law shall deprive any person of the benefit of any such customary law.⁸⁴

Similar laws exist in Northern Nigeria⁸⁵ and Western Nigeria.⁸⁶ Customary laws that fail the repugnancy test are unenforceable and void.

B. APPLICATION OF REPUGNANCY TEST TO POSTHUMOUS PROCREATION

1. Ghost Marriage/Woman-to-Woman Marriage: *Okonkwo v. Okagbue*

At issue in *Okonkwo v. Okagbue* was the validity and enforceability of a custom that allowed sisters of a dead man to marry a wife on his behalf as well as the legal status of any children resulting from such a marriage.⁸⁷ The plaintiffs/appellants were the surviving sons of the late Okonkwo, born to him by his first wife.⁸⁸ The first and second defendants/respondents were the surviving sisters of the late Okonkwo.⁸⁹ Although Okonkwo died in 1931, on or before March 1968, the first and second defendants married the third defendant (X) for and on behalf of their late brother without the knowledge of the plaintiffs.⁹⁰ As a result of the marriage, the third defendant gave birth to six children.⁹¹ The children all bear the name of the late Okonkwo and hold themselves out as his children.⁹²

At issue therefore was the validity of the marriage contracted by the first and second defendants on behalf of the late Okonkwo and the inheritance rights of children born to such a marriage.⁹³ The sole issue for determination was whether the native law and custom in question was repugnant to natural justice, equity, and good conscience or was against public policy.⁹⁴ The Supreme Court started by noting that, "[m]arriage as it

84. *Kharie Zaidan v. Faitma Khalil Mohssen*, 20 J. AFR. L. No. 1, 70, 73 (1976).

85. *Yakubu*, *supra* note 52, at 207.

The High Court shall observe, and enforce the observance of every native law and custom which is not repugnant to natural justice, equity and good conscience, nor incompatible either directly or by implication with any law for the time being in force, and nothing in this law shall deprive any person of the benefit of any such native law or custom.

Yakubu, *supra* note 52, at 207 (citing section 34 (1) of the High Court Law of Northern Region 1963, applicable to the whole of the Northern Region).

86. *Id.* at 207 ("The High Court shall observe and enforce the observance of every customary law which is applicable and is not repugnant to natural justice, equity and good conscience, nor incompatible either directly or by implication with any written law for the time being in force, and nothing in this Law shall deprive any person of the benefit of any such customary law." (citing Laws of Western Region of Nigeria § 12 (1959) (Nig.))).

87. *Okonkwo v. Okagbue and 2 Others*, [1994] 12 N.S.C.C. 40 (Nig.).

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

is commonly known is a union of a man and a woman,” and “[f]or a marriage to be meaningful it is necessary for the husband to physically exist so that the marriage can be consummated.”⁹⁵ The Court further observed that, “one of the essentials of marriage under customary law is the element of procreation; which is only achievable when both the husband and wife are together alive.”⁹⁶ The Court concluded that the purported marriage of the third defendant for the deceased thirty years after his death was a fiction and a fallacy.⁹⁷ According to the Court, “there is no way in which a dead person can naturally get married to the living. It is utterly impossible.”⁹⁸

2. Woman-to-Woman Marriage

Nigerian courts have also held that woman-to-woman marriage is repugnant to natural justice, equity, and good conscience and therefore void.⁹⁹ According to Justice Madarikan in the 1976 case of *Eugene Meribe v. Joshua C. Egwu*:

In every system of jurisprudence known to us, one of the essential requirements for a valid marriage is that it must be the union of a man and a woman thereby creating a status of husband and wife. Indeed, the law governing any decent society should abhor and express its indignation of a “woman-to-woman” marriage; and where there is proof that a custom permits such an association, the custom must be regarded as repugnant by virtue of the proviso to section 14(3) of the Evidence Act and ought not to be upheld by the court.¹⁰⁰

The Supreme Court came to a similar conclusion more recently in *Okonkwo v. Okagbue*.¹⁰¹ Citing with approval the decision in *Meribe v. Egwu*, the Supreme Court in *Okonkwo v. Okagbue* noted that marriage on behalf of the dead was repugnant to natural justice, equity, and good conscience and observed that, at best, what happened in the case was a “marriage” between Okonkwo’s sisters and the woman they married on behalf of their brother, that is, a marriage between a woman and two women.¹⁰² In the opinion of the Court, a woman-to-woman marriage “must

95. EUNICE N. U. UZODIKE, *THE INTERNATIONAL SURVEY OF FAMILY LAW* 343-44 (Martinus Nijhoff Publishers 1997) (citing *Okonkwo v. Okagbue and 2 Others*, [1994] 12 N.S.C.C. 40 (Nig.)).

96. *Id.*

97. *Id.*

98. *Id.*

99. C.O. Akpamgbo, *A “Woman to Woman” Marriage and the Repugnancy Clause: A Case of Putting New Wine Into Old Bottles*, 14 AFR. L. STUD. 87 (1977) (citing *Eugene Meribe v. Joshua Egwu*, [1976] 3 N.S.C.C. 23 (Nig.)).

100. *Id.*

101. *Okonkwo v. Okagbue and 2 Others*, [1994] 12 N.S.C.C. 40 (Nig.).

102. See *supra* notes 95-98 and accompanying text.

be regarded [as] repugnant to natural justice, equity, and good conscience" and is consequently invalid.¹⁰³

3. Levirate Marriage

In *The Estate of Agboruja*, the court upheld the validity of a levirate marriage.¹⁰⁴ Overruling the decision of the Administrator-General that the custom of levirate marriage was repugnant, Ames, Ag. S.P.J. stated:

[T]here can be nothing intrinsically unfair or inequitable even in the inheritance of widows, where those who follow the custom are pagans and not Mohammedans or Christians. The custom is based on what might be called the economics of one kind of African social system, in which the family is regarded as a composite unit.¹⁰⁵

More recently, the United Nations Committee on the Elimination of Discrimination against Women (CEDAW Committee)¹⁰⁶ has categorically stated that it considers customary practices such as the levirate to be a violation of women's fundamental rights¹⁰⁷ and recommends that governments enact legislation to prohibit such practices and prosecute perpetrators of such practices.¹⁰⁸

4. Nwunye Nrachi Custom

In *Muojekwu v. Ejikeme* one of the issues before the Nigerian Court of Appeal (Court of Appeal) was whether the Nrachi custom was valid and enforceable.¹⁰⁹ Relying on the repugnancy principle and international human rights norms, the Court of Appeal concluded that the custom was

103. *Okonkwo*, [1994] 12 N.S.C.C. 40 (Nig.).

104. Yakubu, *supra* note 52, at 211 (citing *The Estate of Agboruja*, [1949] 19 N.L.R. 38 (Nig.)).

105. *Id.*

106. The Committee on the Elimination of Discrimination against Women is a body established pursuant to Article 17 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) to oversee the implementation of the provisions of the treaty. Composed of twenty-three experts, the Committee essentially "acts as a monitoring system to oversee the implementation of the Convention by those States which have ratified or acceded to it." See Office of the High Commissioner for Human Rights, Fact Sheet No. 22, Discrimination Against Women: The Convention and the Committee (Order of June 25, 1993), available at <http://www.unhchr.ch/html/menu6/2/fs22.htm#implementing>.

107. In its concluding observation in response to a report submitted by the Democratic Republic of Congo, the CEDAW Committee stated that "[t]he Committee is concerned at the persistence of traditional customs and practices which are violations of women's fundamental rights, such as dowry, the levirate, polygamy, forced marriage and female genital mutilation." See Committee on the Elimination of Discrimination Against Women, Concluding Observations: Democratic Republic of the Congo (Order of Jan. 2, 2000), available at <http://www1.umn.edu/humanrts/cedaw/congo2000.html>.

108. *Id.*

109. WOMANAID COLLECTIVE, WOMEN AND CHILDREN'S RIGHTS IN NIGERIA 30, http://www.wacolnigeria.org/women_and_children_right.doc (last visited Apr. 8, 2008).

invalid and unenforceable.¹¹⁰ The Court of Appeal noted that “[t]he custom legalizes fornication as the woman, outside the bounds of marriage is free to procreate . . . without the benefit of a husband recognized by law”¹¹¹ and that it “inhibits the God given right of marriage.”¹¹² The Court further observed that the custom was discriminatory in the sense that “[a] daughter with the custom performed on her has the upper-hand over the others without it. She can inherit while the others without the same cannot inherit.”¹¹³ The Court also found the custom discriminatory because it was designed to prefer one sex to the other and “[was] a window dressing designed to oppress and cheat the women-folk.”¹¹⁴ Ultimately, the Court concluded that the Nrachi custom was repugnant to natural justice, equity and good conscience and therefore unenforceable.¹¹⁵ In a damning criticism of the custom, the learned judge Fabiyi, J.C.A. observed:

The polity, as presently constituted, cannot . . . contain what Nrachi custom stands for. It is not neat. It is an antithesis to that which is wholesome and forward looking. It cannot and should not, be allowed to rear its ugly head any longer. It should die a natural death and be buried The custom is perfidious and the petrifying odour smells to high heavens. It is an old time custom. And, “behold, the old order must change and become new.”¹¹⁶

Despite the decision of the Nigerian courts in the above cases, posthumous procreation in all its variations continues in various parts of Igboland.¹¹⁷ The prevalence of these practices despite judicial condemnation suggests a wide gap between law and reality and a silent resistance to the imposition of what some view as Western laws and values.

C. THE REPUGNANCY PRINCIPLE: A CRITIQUE

Although the repugnancy test has on occasion enabled courts in Nigeria to invalidate questionable customary practices, the continued application of this inherited colonial principle in post-colonial Africa is fraught with problems.

First, the repugnancy principle gives the courts “very wide discretion to sift the customary law and to say what should and should not be woven into the fabric of the law of the land.”¹¹⁸ Overly liberal application of the repugnancy principle allows individual judges to arbitrarily supplant

110. WOMANAID COLLECTIVE, *supra* note 109.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Muojekwu v. Ejikeme*, [2000] 5 N.W.L.R. 402, 422-23 (Nig.).

117. *See Obi, supra* note 10.

118. N.M. Ollenu, *The Influence of English Law on West Africa*, 5 J. AFR. L. 21, 27 (1961).

societal rules and customs without reference to the justification for the rules and customs, the effectiveness of the rules and customs, or the preferences of the individuals governed by such rules and customs. Although the Nigerian Supreme Court has expressly warned against too liberal an application of the repugnancy clause,¹¹⁹ courts do not appear to have taken this warning seriously.

Second, the repugnancy principle is arguably a tool for hegemonic control of African laws and regulations. The repugnancy test allows colonial courts to subjugate African customary laws to British laws and values and to impose Western conceptions of morality on Africans.¹²⁰ According to the late Right Honorable Sir Sidney Abraham in a 1948 lecture, "[m]orality and justice must of course mean British and not African conceptions of those attributes. Were that not so British justice would be looking in two different directions at once."¹²¹ Furthermore, in the words of a one-time colonial officer in Nigeria, "[t]he attitude of the English Lawyer towards African law and custom is not that of adaptation but contempt for a worthless thing, which should be abandoned and replaced by European law whole and undefiled."¹²² In post-colonial Africa, the continued application of the repugnancy test perpetuates the idea that the legitimacy of African customary law is hinged not on acceptance by the local population but on their conformity with Western values and ideals.¹²³

Third, absent clear guidelines for the application of the repugnancy principle, legal uncertainties and inconsistent decisions result as individual judges impose their subjective opinions on unfortunate Africans.¹²⁴ In essence, "[n]o one knew beforehand when the application of a customary law could be halted."¹²⁵ It was and remains "difficult to point to any clear and succinct criteria by which the courts enforce or reject a custom on the grounds of repugnancy."¹²⁶ Since opinions differ, as F.A. Ajayi rightly notes, unless applied with some caution, the repugnancy principle may prove to be "a very unruly horse" which may carry its rider "he knows not where."¹²⁷ The problem is that the meaning of the repugnancy doctrine is not altogether clear. It is not clear what "natural justice," "equity," and "good conscience" mean.¹²⁸ Is the phrase "natural justice, equity and good

119. Ollenu, *supra* note 118, at 27 (observing that "[l]ike all discretions given to a court, this discretion has been exercised with great judicial care.").

120. Okereafoezeke, *supra* note 81.

121. Sidney Abrahams, *The Colonial Legal Service and the Administration of Justice in the Colonial Dependencies*, 30 J. COMP. LEGIS. & INT'L L. 1, 8 (1948).

122. Asiedu-Akrofi, *supra* note 55, at 585.

123. Okereafoezeke, *supra* note 81.

124. Eshugbayi, Chief Oloto v. Dawuda & Ors., [1904] 1 N.L.R. 58 (Nig.).

125. Yakubu, *supra* note 52, at 218.

126. Asiedu-Akrofi, *supra* note 55, at 584.

127. Ajayi, *supra* note 77, at 103.

128. *Id.* (observing that the terms are high-sounding and that it would not be easy to offer a strict and accurate definition of the terms).

conscience" interpreted disjunctively? Do the words "natural justice," "equity," and "good conscience" mean the same thing? Adding to the confusion is the appeal to higher law. Of the confusion that the repugnancy test generates, Daniels aptly observed:

When we look for the meaning of equity in the broad sense, we are told that it is equivalent to natural justice. When we try to ascertain the meaning of natural justice we are told that it is practically equivalent to equity in the popular sense. Then both are said to mean natural law. At this juncture we re-enter the realm of uncertainties, but one thing is being made clear: It is that the theory of assigning specific meanings to each of the phrases in the context just quoted is untenable Even though equity is not synonymous with good conscience . . . yet it can be said that the meaning of equity in the broad sense embraces almost all, if not, all, the "concept of good conscience." Therefore in the phrase "equity and good conscience," the words "good conscience" can be regarded as superfluous.¹²⁹

A fourth problem arises since the repugnancy clause only provides a tool for invalidating questionable customary practices and does not address loopholes in the law that are created when laws and practices are voided. In other words, the role of the court is simply to invalidate a custom but not to modify it. As the Privy Council observed in a 1931 case, "the Court cannot itself transform a barbarous custom into a milder one. If it still stands in its barbarous character, it must be rejected as repugnant"¹³⁰

Should the repugnancy principle be abolished? Not necessarily. However, a restrictive application of the repugnancy principle is called for. There are two possibilities: First, continued application of the repugnancy test by the courts subject to clear conditions and guidelines from democratically elected legislatures; second, abolish the repugnancy principle and allow only elected legislative officials to decide when and how to abolish questionable customary rules and practices. Regarding the first proposition, to prevent the use of the repugnancy principle as a pretext for arbitrarily discarding customary laws, a bill of rights enshrined in a national constitution could be used to provide clear standards for evaluating customary laws and practices.¹³¹ Moreover, in deciding whether to

129. W.C. EKOW DANIELS, *THE COMMON LAW IN WEST AFRICA* 270-71 (Butterworth & Co. 1964).

130. *Eshugbayi Eleko v. Officer Administering the Government of Nig.* No. 2, [1931] 3 N.I.L.R. 24 (Nig.).

131. In 1998, the Law Commission of South Africa argued for the repeal of the repugnancy test based on the argument that the repugnancy test has been superseded by the South African Bill of Rights. As noted in a South African Law Commission Discussion Paper, the repugnancy test is "a clear reflection of the ethnocentric bias in South Africa's legal system." S. AFRICAN LAW COMM'N, *THE HARMONISATION OF THE COMMON LAW AND*

invalidate a given law, courts could be required to take into consideration: (1) the nature of the customary law in question; (2) the effect of non-application of the custom on the affected society; (3) the competing rights implicated by the law or practice; and (4) the general opinion of individuals governed by the custom in question. With respect to posthumous procreation, it is also necessary to consider the fundamental need for the survival and existence of a society through a viable and sustainable procreation policy.

The repugnancy principle could be removed entirely from the province of the judiciary. This is not a call for complete immunity for customary laws and practices, as is the case in some countries in Africa where customary law is exempt from the reach of constitutional rights standards.¹³² In most countries in Africa, elected representatives have the responsibility to abolish questionable customary laws and practices.¹³³ Laws have been adopted in Nigeria and other countries in Africa expressly abolishing certain customary law rules and practices.¹³⁴

In the final analysis, the consequences of declaring a given custom unenforceable and invalid must always be borne in mind. To set aside a given custom or practice is in effect to fundamentally alter the culture and way of life of a people.

IV. POSTHUMOUS PROCREATION, CULTURE AND INTERNATIONAL HUMAN RIGHTS LAW

This section offers a critique of PPAS. Three areas of concern are highlighted: concerns about children, concerns about public health and safety, and concerns about the welfare of women in Africa. First, troubling questions arise when the fates of children who are the products of these practices are carefully evaluated. Second, to the extent that PPAS is a direct consequence of a patriarchal culture that places a premium on the male child and gives voice primarily to men, African women have cause to be concerned. Finally, in the context of the AIDS epidemic in Africa, the wisdom of practices that sanction extramarital sex must be rethought from the standpoint of public order, public health, and the overall welfare of the society.

THE INDIGENOUS LAW: CONFLICTS OF LAW 40 (1998).

132. In countries such as Gambia, Zimbabwe, and Sierra Leone, customary law has a level of constitutional immunity from constitutional rights challenges. A good example is Section 23 of the Constitution of Zimbabwe. Under Articles 23(3)(a) and 23(3)(b) of the Constitution, customary laws and practices are exempt from the application of the provisions of the Constitution prohibiting discrimination on the basis of sex. Chidi Anselm Odinkalu, *Informal Responses to Access to Human Rights*, INT'L COUNCIL ON HUMAN RIGHTS POLICY 7 (2003).

133. *Id.* (inferring that customary laws should be abolished if they do not meet a test of "normative content — 'repugnancy test.'").

134. *Id.* at 7-8.

A. PPAS AND THE WELFARE OF CHILDREN IN AFRICA

The biggest problem with PPAS is that the resulting children are denied the paternity of their natural fathers¹³⁵ and do not enjoy real fatherly love throughout their lifetime. In bygone years when the extended family network was strong and there were many male relatives who were able and willing to assume the role of a father, this may not have posed a problem. However, given growing individualism, the idea of children growing up without father figures is troubling.

First, the care and responsibility for posthumous children in Africa rests primarily on the mothers, contrary to Article 18(1) of the Convention on the Right of the Child (CRC), pursuant to which State Parties undertake to "use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child."¹³⁶

Second, given the grim statistics on the fate of children in female-headed households,¹³⁷ any custom that may encourage the formation of female-headed households deserves strict scrutiny. In many parts of Africa, female-headed households are the most vulnerable to food insecurity and bear the brunt of poverty.¹³⁸ The Community and Household Surveillance (CHS) study, released by the Consortium for Southern Africa's Food Emergency (C-SAFE) and the World Food

135. In *Muojekwo & Ors. v. Ejikeme & Ors.*, the Nigerian Court of Appeal struck down the nrachi custom as repugnant to natural justice in part because, according to the court, "the children born to a daughter in respect of whom the ceremony is performed are denied the paternity of their natural father." See *Muojekwo & Ors. v. Ejikeme & Ors.*, [1999] 5 N.W.L.R. 402 (Nig.), summaries available at <http://www.worldlii.org/cgi-bin/displ/int/cases/ICHRL/1999/168.html?query=muojekwo>.

136. Convention on the Rights of the Child, Nov. 20, 1989, art 18(1) G.A. Res. 44/25, annex, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/RES/44/25 (1989), available at <http://www.hrweb.org/legal/child.html> [hereinafter Convention on the Rights of the Child].

137. See generally Mayra Buvinic & Geeta Rao Gupta, *Female-Headed Households and Female-Maintained Families: Are They Worth Targeting to Reduce Poverty in Developing Countries?* 45 ECON. DEV. & CULTURAL CHANGE No. 2 259, 267 (1997); Eileen Kennedy & Lawrence Haddad, *Are Pre-schoolers From Female-Headed Households Less Malnourished? A Comparative Analysis of Results from Ghana and Kenya*, 30 J. OF DEV. STUD. No. 3 680, 684-85 (1994); Cynthia B. Lloyd & Anastasia J. Gage-Brandon, *Women's Role in Maintaining Households: Family Warfare and Sexual Inequality in Ghana*, 47 POPULATION STUD. No. 1 115 (1993), available at <http://links.jstor.org/sici?sici=0032-4728%28199303%2947%3A1%3C115%3AWRIMHF%3E2.0.CO%3B2-E>; Sonalde Desai, *Children at Risk: The Role of Family Structure in Latin America and West Africa*, 18 POPULATION & DEV. REV. No. 4 689, 702 (1992).

138. See also Buvinic & Gupta, *supra* note 137; Sherrie Kossoudji & Eva Mueller, *The Economic and Demographic Status of Female-Headed Households in Rural Botswana*, 31 ECON. DEV. & CULTURAL CHANGE No. 4 831, 843 (1983); F. Catherine Johnson & Beatrice Lorge Rogers, *Children's Nutritional Status in Female-Headed Households in the Dominican Republic*, 37 SOC. SCI. & MED. No. 12 1293, 1294-95 (1993); Ellen L. Bassuk et al., *Homelessness in Female-Headed Families: Childhood and Adult Risk and Protective Factors*, 87 AM. J. PUB. HEALTH 241, 241 (1997).

Programme (WFP), is instructive.¹³⁹ Based on information gathered in October 2003 and March 2004, the study analyzed the livelihood and food security status of households and vulnerable groups in three southern African countries.¹⁴⁰ The study found that in Zimbabwe, “[a]mong several vulnerable groups, including households with a chronically ill, disabled or orphaned member, female-headed households were more prone to vulnerability than their male counterparts,”¹⁴¹ and “[n]inety percent of all female-headed households fell into two or more vulnerable categories, while only [thirty-nine] percent of their male counterparts were in the same situation.”¹⁴² How might posthumous procreation affect the welfare of children, especially in countries where governments assume no responsibility whatsoever for the care and development of children and where social welfare programs are nonexistent?

Third, it is not particularly clear who, besides the mothers, is responsible for the care and upbringing of posthumous children in Africa. Arguably, the extended family is responsible. However, the precise responsibility of the extended family is vague and ill-defined at best.¹⁴³ Is the responsibility of the extended family conditioned on the continuing loyalty and good behavior of the mothers of these children? What happens if the extended family shirks its responsibility? These questions are pertinent because the CRC envisages that the primary responsibility for the upbringing of children should fall on parents and guardians and not on the state;¹⁴⁴ states only play a supporting role.¹⁴⁵ The problem is that customary laws in Africa have no institutionalized oversight mechanisms.¹⁴⁶ Like most aspects of customary laws, the efficacy of rules relating to guardianship of children is “ultimately underwritten by the personal honesty and integrity of elders and by continued legitimacy in the eyes of the community.”¹⁴⁷

Fourth, the psychological health of the children who are the product of PPAS is rarely, if ever, considered. However, as McWhinnie and Bisset

139. Health System Trust, Southern Africa: Female-Headed Households Most Vulnerable to Food Insecurity, (Aug. 2, 2004) *available at* <http://www.hst.org.za/news/20040432>.

140. *Id.*

141. *Id.*

142. *Id.*

143. *See* Convention on the Rights of the Child, *supra* note 136, at art. 5.

144. *Id.* at art. 18(1) (“The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child’s development.”).

145. *Id.* at art. 27(3) (“States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.”).

146. *See* Odinkalu, *supra* note 132, at 12.

147. *Id.*

rightly observe, children “can experience psychological problems in childhood, at adolescence and as adults directly related to the methods used in their creation.”¹⁴⁸ Problems abound regardless of whether the circumstances of a child’s birth are publicized or kept secret. Publicized, posthumous children sometimes become the target of village jokes and snide remarks. Kept secret, the problem arises of attempting to foster a stable, nurturing and long-lasting personal relationship built on a bedrock of secrecy.

B. POSTHUMOUS PROCREATION AND THE WELFARE OF AFRICAN WOMEN

PPAS also implicates women’s rights. First, the need for posthumous reproduction frequently arises because a man died without a surviving male child. To continue the lineage, the custom makes a provision for reproduction of a male descendant by any means possible.¹⁴⁹ The practice arguably perpetuates the idea that girls are inferior to boys and that men are more relevant in a family than women, contrary to the spirit and letter of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).¹⁵⁰ Under Article 2 of CEDAW, State Parties “condemn discrimination against women in all its forms,” and “agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women”¹⁵¹ State Parties undertake, pursuant to Article 5 of CEDAW, to:

[M]odify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.¹⁵²

Second, PPAS may also encourage violence against women, although no empirical studies exist to date to support this position. Frequently, it is the male members of a man’s family who take or approve the decision

148. SELECT COMMITTEE ON SCIENCE AND TECHNOLOGY WRITTEN EVIDENCE, MEMORANDUM FROM DR. ALEXINA MCWHINNIE AND PROFESSOR ALASTAIR BISSETT, APP. 87 art. 1.06, 2004.

149. See IFAD, Gender Mainstreaming in IFAD Supported Projects in West and Central Africa, available at http://www.ifad.org/gender/progress/pa/pa_2.htm (last modified Apr. 12, 2007) (observing that in the majority of West and Central African countries, land is inherited patrilineally or is allocated to males according to lineage).

150. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180/Annex, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. 34/180-79 (Dec. 18, 1979) (“[D]iscrimination against women’ means any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”).

151. *Id.*

152. *Id.*

about the need and modalities of posthumous conception.¹⁵³ In such situations, the wishes of the woman involved may be ignored or forgotten. Much would depend on whether the woman involved is able to negotiate who the biological father will be. Where the choice is made by the family members and not the woman, one can envisage rape, humiliation, and forced impregnation. Given the primacy of the family in the traditional legal system in Africa, the well-being of widows may be subordinated to the preservation of the family and the conservation of its authority.

Third, hinged as it is on widow inheritance, PPAS raises concerns about the overall welfare of widows in Africa because it commodifies and objectifies poor African women and subjects them to the whims and caprices of unscrupulous relatives.¹⁵⁴ Admittedly, in some cases, widows willingly accept the offer of a levirate marriage or other arrangements in order to produce children to carry the dead husband's name. However, such decisions are usually a result of the precarious position of childless widows in Africa. Frequently, posthumous reproduction is the only mechanism available for a widow to protect her husband's property and safeguard the interest of any surviving children, particularly female children.¹⁵⁵ PPAS thus masks the plight of widows and prevents more serious efforts at addressing the situation of widows on the continent.

Fourth, posthumous procreation could indirectly sentence widows to a lifetime of poverty and servitude because a widow could find herself with children but with no means of support. Customary laws in Africa emphasize duty and responsibility as the basis for entitlements.¹⁵⁶ Consequently, a widow could be easily deserted by family members and left to fend for herself and her children if she is seen to be challenging the status quo. PPAS does not guarantee support or protection for a widow.

C. POSTHUMOUS PROCREATION AND PUBLIC HEALTH IN AFRICA

PPAS raises important questions about the sexual reproductive rights of women and the range of inequalities and customary practices that drive the spread of HIV/AIDS in Africa today. Does PPAS encourage promiscuity and the sharing of partners? Do customary practices that put pressure on women to have children outside the boundaries of a monogamous marriage relationship heighten their vulnerability to HIV/AIDS? Do customary practices that encourage men to "donate" their sperm ultimately expose the men, their wives and the donee to HIV infection? While these questions might have been ignored in bygone years,

153. See generally, MEEK, *supra* note 11, at 320-21 (explaining that men are typically the decision makers regarding a dead man's estate, which includes his wives).

154. *Id.* at 371.

155. Marriage Rules: Part II, *supra* note 25.

156. See generally, MEEK, *supra* note 11, at 320-21 (explaining how rules of inheritance are structured in order to allow one family member, usually the oldest son, to care for the rest of the family).

they can no longer be ignored in the wake of HIV/AIDS and the finding that multi-partnered sexual behavior increases the risk of HIV infection.¹⁵⁷

PPAS arguably encourages multi-sexual behavior and may increase the spread of HIV in Africa.¹⁵⁸ In *Okonkwo v. Okagbue*, the plaintiff/appellants successfully argued that “to marry a woman for a dead and non-existent man will amount to giving the woman license to have indiscriminate sexual intercourse especially where children are expected from such [an] absurd union.”¹⁵⁹ Although in theory, a woman may have the right to decide who she will sleep with in order to have children for her dead husband, the truth is that “[w]hen it comes to decision making in relationships, men are expected to dominate and women to be passive.”¹⁶⁰ Tallis rightly notes that “[u]nequal parties are not in a position to negotiate when they have sex, how often and how they can protect themselves from sexually transmitted infections (STIs) and HIV.”¹⁶¹ This observation is even more pertinent when the woman involved is a widow. As noted in an earlier work, widows are very vulnerable in Africa — vulnerability that is fueled by poverty, illiteracy, and uncertainties about a future with no husband.¹⁶² Because the HIV/AIDS epidemics “are at their worst in regions where poverty and economic inequality is extensive and gender inequality is pervasive and access to public service is weak and uncertain,”¹⁶³ practices that exacerbate the vulnerabilities of women and children must always be carefully evaluated.

157. See generally John C. Caldwell et al., *The Social Context of AIDS in sub-Saharan Africa*, 15 POPULATION & DEV. REV. 185 (1989); John C. Caldwell et al., *Changes in the Nature and Levels of Sexual Networking in an African Society: The Destabilization of the Traditional Yoruba System*, (Australian Nat’l Univ., Working Paper No. 4, 1990).

158. See generally John C. Caldwell et al., *The Role of High-Risk Occupations in the Spread of AIDS: Truck Drivers and Itinerant Market Women in Nigeria* 19 INT’L FAM. PLAN. PERSP. 43, 47-48 (1993); Christine Oppong, *A High Price to Pay: for Education, Subsistence or a Place in the Job Market*, 5 HEALTH TRANSITION REV. 35, 41-42 (1995); James P.M. Ntozi, *Widowhood, Remarriage and Migration During the HIV/AIDS Epidemic in Uganda*, 7 HEALTH TRANSITION REV. 125, 128 (1997) (suggesting that cultural practices such as the levirate marriage may increase the spread of HIV); see also J.R.S. Malungo, *Challenges to Sexual Behavioural Changes in the Era of AIDS: Sexual Cleansing and Levirate Marriage in Zambia*, in RESISTANCES TO BEHAVIOURAL CHANGES TO REDUCE HIV/AIDS INFECTION 41, 41 (1999).

159. *Okonkwo v. Okagbue* and 2 Others, [1994] 12 N.S.C.C. 40 (Nig.).

160. VICCI TALLIS, GENDER AND HIV/AIDS: OVERVIEW REPORT 2 (Bridge Publications 2002), available at <http://www.ids.ac.uk/bridge/reports/CEP-HIV-report.pdf>.

161. *Id.*

162. See generally Uché U. Ewelukwa, *Post-Colonialism, Gender and Customary Injustice: Widows in African Societies*, 24 HUM. RTS. Q. 424, 452 n.94 (2002).

163. TALLIS, *supra* note 160, at 2.

V. TO REPEAL OR NOT TO REPEAL: INTERNATIONAL HUMAN RIGHTS NORMS MEET ENTRENCHED CUSTOMARY PRACTICES

Judged from an international human rights standpoint, PPAS raises many troubling questions. However, a hasty application of international human rights law (IHRL) to PPAS could be problematic and ultimately counterproductive. This section examines the strengths and weaknesses of deploying international human rights norms in any attempt to reform African customs relating to posthumous procreation.

A. STRENGTHS OF THE HUMAN RIGHTS FRAMEWORK

Unlike the repugnancy test, international human rights law offers a set of clearly defined legal standards by which questionable customary laws and practices may be evaluated. Arguably, the international human rights framework avoids the vagueness that surrounds the repugnancy test and may thus curtail unreasonable exercise of judicial discretion. Second, the widespread ratification of international human rights treaties by states in Africa arguably means greater acceptance and legitimacy of IHRL in Africa. The CRC is a prime example; with the exception of Somalia, all African countries have ratified the CRC.¹⁶⁴ Third, the fact that African states have adopted key regional human rights treaties also strengthens the case for using human rights norms in reform efforts on the continent. Key regional treaties adopted in Africa to date include the African Charter on Human and Peoples' Rights,¹⁶⁵ the African Charter on the Rights and Welfare of the Child,¹⁶⁶ and the Protocol to the African Charter on the Rights of Women in Africa.¹⁶⁷

B. WEAKNESSES OF THE HUMAN RIGHTS FRAMEWORK

There are several problems associated with using IHRL in reform efforts in Africa. First, the human rights framework often yields contradictory results and may impose hidden costs on a society, that is, the costs associated with abolishing an entrenched customary practice. Second, the human rights framework frequently generates resistance on the ground in part because of the biased approach to reform efforts by human rights advocates. Although PPAS clearly implicates numerous

164. See Office of the UN High Commissioner for Human Rights, Status of Ratifications of the Principle International Human Rights Treaties, *available at* <http://www.unhchr.ch/pdf/report.pdf>.

165. Organization of African Unity, African Charter of Human and Peoples' Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5 (1982).

166. Organization of African Unity, African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990).

167. African Commission on Human & Peoples' Rights, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, CAB/LEG/66.6 (Sept. 13, 2000), *reprinted in* 1 AFR. HUM. RTS. L.J. 40 (2001).

internationally guaranteed human rights, problems arise when human rights advocates condemn practices originating in non-Western societies without critiquing arguably comparable practices in the West.

1. Contradictory Results/Cost to Society

The application of IHRL to PPAS may lead to the invalidation of age-old customary rules and practices. When customs are abruptly invalidated, the resulting gaps in societal rules and regulations could be very problematic as other guaranteed rights may be violated in the process. For example, based on the argument that widow inheritance is a traditional mechanism for protecting widows, prohibiting widow's inheritance could potentially increase the spread of HIV/AIDS by creating a whole class of unmarried, unattached, and extremely vulnerable widows. Without the protection and support that widows' inheritance offers, widows could be forced to engage in high-risk sexual behavior in order to support themselves and their children.

Children may also be affected by any decision to abruptly abolish PPAS. For example, the decision in *Okonkwo v. Okagbue*, in which the Nigerian Supreme Court invalidated the customary law relating to ghost marriage, has the potential to negatively affect millions of posthumously born children — children who, until the decision was rendered, viewed themselves and were viewed by their society as legitimate members of their extended family.¹⁶⁸

Although the CRC does not speak specifically about posthumous children,¹⁶⁹ it lays down principles that apply to such children. Of particular importance are the principles of non-discrimination (Article 2) and the best interest of the child (Article 3). The consequences of declaring a long-established custom invalid may be to create a whole new category of "illegitimate" and stigmatized children. In Article 2 of the CRC, state parties undertake to "respect and ensure" the rights set forth in the convention "to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, *birth or other status*."¹⁷⁰ Furthermore, Article 2(2) provides that state parties "shall take *all appropriate measures* to ensure that the child is protected against *all forms of discrimination or punishment on the basis of the status . . . of the child's parents, legal guardians, or family members*."¹⁷¹ Article 3(1)

168. *Okonkwo v. Okagbue and 2 Others*, [1994] 12 N.S.C.C. 40 (Nig.).

169. Convention on the Rights of the Child, *supra* note 136, art. 1 ("For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.").

170. *Id.* at art. 2(1) (emphasis added).

171. *Id.* at art. 2(2) (emphasis added).

provides that "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, *the best interests of the child shall be a primary consideration.*"¹⁷² One solution may be for posthumous children in Nigeria and the rest of Africa to become wards of states protected in accordance with Article 3(2) of the CRC.¹⁷³ It is unlikely, however, that the Nigerian government would be willing or able to assume full responsibility for the thousands of children who are likely to be affected.

A ruling that renders thousands of children illegitimate may also affect the survival and development of a child and thus implicate Article 6 of the CRC, which states that "States Parties recognize that every child has the inherent right to life" and "shall ensure to the maximum extent possible the survival and development of the child."¹⁷⁴ The decision in *Okonkwo v. Okagbue* also arguably denies a child the right to a name, contrary to Article 7(1) which states that "[t]he child shall be registered immediately after birth and *shall have the right from birth to a name . . . and, as far as possible, the right to know and be cared for by his or her parents.*"¹⁷⁵ Every child has a right to preserve his or her identity, and it is the duty of State Parties to the CRC to respect the right of the child in this respect.¹⁷⁶

To abruptly invalidate posthumous procreation in Africa could mean that thousands of children may be forcibly removed from their homes and their extended family network, in violation of Article 9 of the CRC. Article 9 states that, "States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child."¹⁷⁷ One can imagine a situation where a posthumous child is living with a father's relative who turns out not to be his relative based on the Supreme Court decision holding that the living cannot contract marriage for the dead.¹⁷⁸ Even if removal is ultimately the best solution, several thorny questions inevitably arise. First, will all affected children be given the opportunity to participate in termination

172. Convention on the Rights of the Child, *supra* note 136, at art. 3(1) (emphasis added).

173. *Id.* at art. 3(2) ("States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.").

174. *Id.* at art. 6(1), 6(2).

175. *Id.* at art. 7(1) (emphasis added).

176. *Id.* at art. 8(1) ("States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.").

177. *Id.* at art. 9(1).

178. See *Okonkwo v. Okagbue and 2 Others*, [1994] 12 N.S.C.C. 40 (Nig.).

proceedings in accordance with Article 9(2)?¹⁷⁹ Will such children be permitted to maintain any form of relationship with the family they once thought was theirs, as required by Article 9(3)?¹⁸⁰ Will the children be allowed to express their views regarding their fate, as required by Article 12? Article 12(1) clearly states that State Parties “shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.”¹⁸¹ Finally, even if the children are removed from their homes, what type of protection will be afforded them? The question is pertinent because Article 20(1) of the CRC provides that, “[a] child temporarily or permanently deprived of his or her family environment . . . shall be entitled to special protection and assistance provided by the state.”¹⁸² Under Article 20, State Parties are expected to ensure the availability of alternative care for children deprived of their family environment.¹⁸³

In countries where children already suffer from family and societal neglect and the “street children” phenomenon is on the rise, a decision that renders thousands of children illegitimate may lead to an increase in the trafficking of children.¹⁸⁴ The rights of children to associate with family members and be part of village associations, such as the age-grade association and masquerade, will inevitably be affected contrary to Article 15 of the CRC.¹⁸⁵ Finally, the abrupt abolition of age-old customs relating

179. Convention on the Rights of the Child, *supra* note 136, at art. 9(2) (“In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.”).

180. *Id.* at art. 9(3) (“States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests.”).

181. *Id.* at art. 12(2) (“For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”); *Id.* at art. 13(1) (“The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child’s choice.”).

182. *Id.* at art. 20(1).

183. *See id.* at art. 20(2); *id.* at art. 20(3) (“Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background.”).

184. *Id.* at art. 11(1) (“States Parties shall take measures to combat the illicit transfer and non-return of children abroad.”).

185. *Id.* at art. 15(1) (“States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly.”); *id.* at art. 15(2) (“[n]o restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.”).

to posthumous procreation could raise questions about possible interference with the privacy rights of posthumous children. Article 16 of the CRC provides that "[n]o child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her . . . honour and reputation."¹⁸⁶ Article 16(2) provides that the child "has the right to the protection of the law against such interference or attacks."¹⁸⁷

Overall, with hundreds and possibly thousands of children abruptly denied a family name and the protection of the extended family, the survival and development of many children could be seriously jeopardized.¹⁸⁸ For one thing, the social security benefits of children involved will be affected, because in traditional societies the extended family system serves as the child's social security.¹⁸⁹ Other areas of concern include the right to health,¹⁹⁰ the right to education,¹⁹¹ freedom from economic exploitation, the risk of sexual exploitation and other forms of exploitation,¹⁹² and the risk of a rise in the sale of, or traffic in, children.¹⁹³

2. A Biased Human Rights Framework

If the notion of human rights is a Western concept as some scholars contend¹⁹⁴ and if international human rights treaties are expressions of their predominantly Western constituencies, caution is required in the manner in which human rights norms are deployed in crusading against practices in non-Western societies. Until the normative universality of human rights is fully realized, applying human rights in societies across the globe will require care, caution, and dialogue. Moreover, there is an urgent need to

186. Convention on the Rights of the Child, *supra* note 136, at art. 16(1).

187. *Id.* at art. 16(2).

188. *Id.* at art. 27(1) ("States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.").

189. *Id.* at art. 26(1) ("States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law.").

190. *Id.* at art. 24(1) ("States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.").

191. *Id.* at art. 28(1) ("States Parties recognize the right of the child to education . . .").

192. *Id.* at art. 36 ("States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.").

193. *Id.* at art. 35 ("States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.").

194. See generally THE EAST ASIAN CHALLENGES OF HUMAN RIGHTS (Joan R. Bauer & Daniel A. Bell eds., 1999). See also MAKAU MUTUA, HUMAN RIGHTS: A POLITICAL AND CULTURAL CRITIQUE 11 (Univ. of Penn. Press 2002).

rid international human rights discourse of the double standard that currently affects it, seen in the obsession with practices in non-Western societies and blind indifference to arguably comparable practices in Western societies. The problem, Odinkalu rightly observed, is that “[t]here is a triumphalist and confusing ambivalence in the relationship of formal human rights systems and mechanisms of non-formal systems.”¹⁹⁵ Odinkalu goes on to observe that this ambivalence which is both racially constructed and paternalistic, “has its origin in an erroneously racialized understanding of non-formal authorities as only existing in non-Western, ‘under-developed’ societies of the hemispheric South, or among ‘indigenous’ minorities of the Northern Half.”¹⁹⁶

Regarding posthumous procreation, the problem is that the work of the CEDAW Committee involves a certain degree of institutional blindness. By focusing on posthumous procreation in Africa while disregarding posthumous procreation in the West, the CEDAW Committee unintentionally widens the gap between the West and the rest of the world.¹⁹⁷ Arguably, it is morally wrong for the CEDAW Committee to criticize the practices of one culture unless it is similarly critical of comparable practices that occur in other cultures. This is not to suggest that the African approach to posthumous conception is morally on par with the Western approach to posthumous reproduction using ARTs. In many respects, cultures are hardly commensurable. However, while there are basic differences in the two approaches, from the standpoint of the welfare of posthumous children in general, the two approaches are quite comparable. Exclusive focus on practices in non-Western cultures makes cross-cultural conversations more difficult and stifles the process of multicultural exchange.

3. A Paternalistic Approach in Human Rights Work

International human rights norms evoke images of the repugnancy test effectively utilized by some colonial powers to invalidate African laws and practices. Indeed, “the repugnancy test could today easily approximate to a test of compatibility with human rights norms.”¹⁹⁸ Perceived to be an extension of imperial colonial policies whereby everything African was considered inferior and in need of reform, forced application of international human rights norms inevitably generates resistance on the ground. The fact that customary laws “enjoy the kind of legitimacy that is not accorded formal sources of human rights norms in the communities to

195. Odinkalu, *supra* note 132.

196. *Id.*

197. Yael Tamir, *Hands Off Clitoridectomy*, BOSTON REV. (1996), available at <http://bostonreview.net/BR21.3/Tamir.html> (last visited Mar. 1, 2008) (arguing that the condemnation of female genital mutilation in the West intentionally widens the gap between the Western culture and those in which clitoridectomy is practiced).

198. Odinkalu, *supra* note 132, at 7.

which they are applicable”¹⁹⁹ is not fully appreciated by human rights advocates anxious for change. The result is a great divide between human rights practitioners and the people on the ground whose lives are regulated by non-formal laws and systems. With respect to PPAS, for example, there are several economic factors that contribute to the survival of the practice. The most important factor is the need to safeguard family property and ensure that wealth remains within the family — transferred from one generation of males to another.²⁰⁰ Second, because the ability to have children is one of the grounds on which the extended family extends care and protection to widows, poor infertile women in Africa will readily resort to PPAS if they lack independent access to property and income.²⁰¹ Thus, one obstacle to reforming PPAS in Africa is the fact that many women in the continent willingly embrace the practice and view it as a solution to their problems — the problem of childlessness, the problems associated with widowhood, and the problem of poverty. Third, poverty and lack of access to modern technology also means that cryopreservation of sperm and artificial insemination as practiced in the West are out of the reach of most African women. Without access to new technologies available in the West, the present approach to posthumous conception in Africa is likely to continue.

In conclusion, although customary laws and practices can operate to constrain individual freedom and access to human rights, forced or hasty abolition of age-old laws and practices can be counter-productive, polarizing, and costly. “Bound up as they are in the construction of personal and communal identities,” attempts to reform customary law, Odinkalu rightly notes, “could easily become both combustible and counter-productive if not managed with care.”²⁰² Human rights advocates must appreciate the fact that customary laws in Africa emphasize duty and responsibility rather than individual rights and tread wisely.

VI. WESTERN APPROACH TO POSTHUMOUS REPRODUCTION: TOWARDS A CROSS-CULTURAL DIALOGUE

In the West, advances in technology are providing new opportunities for women to conceive and bear children long after the death of their male partners. Indeed, new technology allows experts to retrieve sperm from terminally ill, brain-dead and even clinically dead men and to store the

199. Odinkalu, *supra* note 132, at 9.

200. Jeevan Vasagar, *Where Death Eats Up the Means of Life: Lavish Funeral Practices and Family Traditions Are More Than Kenya's Luo*, THE GUARDIAN, Jan. 10, 2004, available at <http://www.guardian.co.uk/world/2004/jan/10/kenya.jeevanvasagar>.

201. See generally, Ewelukwa, *supra* note 162, at 454-56 (explaining that some Nigerian tribes' customs and laws do not allow widows to inherit, favoring children and other relatives instead).

202. Odinkalu, *supra* note 132, at 13.

materials so removed for later use.²⁰³ Cryopreservation of sperm allows for artificial insemination by a male partner regardless of whether he is dead or alive.²⁰⁴ Overall, retrieval of sperm from dead or brain-dead persons enables individuals and families to preserve the “bloodline” through subsequent artificial insemination.²⁰⁵

Posthumous conception and reproduction using advanced technologies raises many thorny and troubling questions. While it is now possible in the West to avoid the more primitive approaches to posthumous procreation, PPWS is nevertheless a deviation from the norm. In legal battles in countries such as the United States, Australia, the United Kingdom, and France, courts have grappled and are still grappling with new issues raised by PPWS such as whether a judge can or should authorize the retrieval of sperm from a dead man and whether children conceived posthumously can be recognized as the legal heirs of their dead father.²⁰⁶ Surprisingly, despite the important ethical questions surrounding the practice of posthumous retrieval, storage and use of sperm from dead men, the practice has thus far not been a subject of consideration by international human rights organizations.

There is clearly a hierarchy of preferred methods of sperm collection from a husband for insemination procedures. Regarding PPWS, three situations typically encountered are: (1) retrieval and cryopreservation of sperm for future use at the request of a healthy man facing an infertility problem (level 1); (2) retrieval and cryopreservation of sperm from a brain-dead or unconscious man at the request of his wife or girlfriend for possible future use (level 2); and (3) retrieval and cryopreservation of sperm from a dead man at the request of his wife or girlfriend for possible future use (level 3). While all three raise troubling questions, this paper will focus primarily on PPWS level 3, and to some extent on PPWS level 2.

In this section, I offer an overview of the range of legal issues arising in countries such as France, Australia, the United Kingdom, and the United States with respect to posthumous paternity. I also examine the human rights and public policy issues that are raised. Finally, I compare the

203. Richard V. Grazi & Joel B. Wolowelsky, *The Use of Cryopreserved Sperm and Pre-Embryos in Contemporary Jewish Law and Ethics*, JEWISH LAW, <http://www.jlaw.com/Articles/semen.html> (last visited Mar. 1, 2008) (observing that death, brain death, and terminal illness are common circumstances in which electroejaculation for retrieval of sperm is requested, with requests typically coming from widows, wives, or girlfriends of the man involved).

204. LORAS BIOETHICS RESOURCE CENTER, IMPERMISSIBLE CASES OF ARTIFICIAL INSEMINATION BY HUSBAND (AIH), <http://www2.loras.edu/~CatholicHE/Arch/Sexuality/AIH.html> (last visited Apr. 7, 2008). Also referred to as *homologous artificial insemination*, artificial insemination by husbands refers to every technique used to bring about conception through the transfer into the genital tracts of a married woman of the sperm previously collected from her husband. *Id.*

205. Grazi & Wolowelsky, *supra* note 203.

206. See *infra* Section VI. D. of this Article.

Western approach to posthumous procreation to the African approaches to the same problem.

A. PRE-MORTEM RETRIEVAL AND POST-MORTEM INSEMINATION

Are spermatozoa a form of property that can be bequeathed in a will or otherwise freely transferred as the owner deems fit? What ethical questions arise when sperm is retrieved and cryopreserved at the request of a healthy male who dies subsequently without designating how his sperm may be disposed of? Can the deceased wife or significant other use the sperm to achieve conception posthumously? Should the answer depend on whether or not the deceased consented to the posthumous use of his sperm?

In a 1984 French case, the issue was whether the wife of a deceased man could procreate using sperm retrieved while the husband was alive.²⁰⁷ In *Parpalaix v. CECOS*, Mr. Alain deposited his spermatozoa with the Centre d'Etude et de Conservation du Sperme Humain (CECOS) for storage, prior to undergoing treatment for his cancer but left no instruction concerning his spermatozoa in the event of his death.²⁰⁸ When Mr. Parpalaix subsequently died from his illness and his wife sought to use his sperm for insemination, CECOS refused to release the sperm to her.²⁰⁹ CECOS argued that sperm, as an indivisible part of the body, is not like a tangible property that can be inherited absent specific instructions from the sperm donor.²¹⁰ Mrs. Parpalaix sought to treat the sperm as a movable object subject to ordinary property laws governing movable property.²¹¹ Applying ordinary contract principles, Mrs. Parpalaix argued that pursuant to the contract with Mr. Parpalaix, CECOS was bound to return what it had received.²¹² The Court ruled that its decision must be guided by the intent of Mr. Parpalaix because sperm is "the genetic expression" of a person's right to procreate.²¹³ Having found that Mr. Parpalaix had intended for his wife to use the sperm to have their children, the Court ordered CECOS to deliver the sperm to Mrs. Parpalaix and her doctors for insemination or destruction.²¹⁴

In *Centre for Reproductive Medicine v. U.*, the donor appeared to consent to the retrieval and storage of his sperm but not the posthumous use of the sperm by his wife.²¹⁵ On September 6, 2000, Mrs. U's husband

207. Evelyne Aziza-Shuster, *A Child At All Costs: Posthumous Reproduction and the Meaning of Parenthood*, 9 HUM. REPROD. No. 11 2182, 2182-84 (1994) (discussing the case of *Parpalaix v. CECOS*, Tribunal de Grande Instance de Creteil (I Ch. Cir.) Aug. 1, 1984, *Gazette du Palais*, Sunday, Sept. 16-18, pp. 11-14).

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *Centre for Reproductive Medicine v. U.*, [2002] EWHC (Fam) 36, [2002] Fam.

signed a consent form agreeing to the retrieval and storage of his sperm.²¹⁶ The sperm was surgically removed on September 7, 2000 and stored with the Centre for Reproductive Medicine at Bristol University (the Centre).²¹⁷ However, on October 25, 2000, following a consultation with a specialist nursing sister, Mr. U changed the consent form by withdrawing his consent to the posthumous use of his sperm.²¹⁸ On January 9, 2001, Mr. U died tragically and unexpectedly.²¹⁹ Following Mr. U's death, the widow sought to use the sperm collected to achieve pregnancy, but the Centre refused on the grounds that the deceased did not consent to the posthumous use of his sperm.²²⁰ In an application to the court, the Centre sought an order permitting it to destroy the deceased's sperm.²²¹ On January 25, 2002, the President of the Family Division granted the Centre permission to allow Mr. U's sperm to perish or otherwise to destroy it.²²² Mrs. U appealed, arguing that the original consent given by her deceased husband should stand because its withdrawal was the result of undue influence.²²³ The Court of Appeal denied her appeal, holding that the retrieval and storage of sperm pursuant to the Human Fertilisation and Embryology Act 1990 is premised on full and informed consent of the donor.²²⁴ The Court of Appeal further held that, based on the facts of the case, the Centre did not have effective consent for the continued storage and later use of these sperm, and Mrs. U did not prove undue influence.²²⁵

B. RETRIEVAL AND STORAGE OF SPERM FROM UNCONSCIOUS AND BRAIN-DEAD INDIVIDUALS

In the United Kingdom and other Western nations, cases are arising where relatives are requesting the retrieval of sperm from unconscious or brain-dead men. The English case of *R. v. Human Fertilisation and Embryology Authority, ex parte Blood* involved a 33 year-old woman's battle for the right to receive fertility treatment using sperm collected while her husband, Stephen Blood, was in a coma.²²⁶ Diana Blood and Stephen Blood married in 1991.²²⁷ Towards the end of 1994 they decided to try and

Law 267 (Ct. of App. Eng. & Wales).

216. *Centre for Reproductive Medicine v. U.*, [2002] EWHC (Fam) 36.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *R. v. Human Fertilisation and Embryology Authority, ex parte Blood*, [1999] Fam. 151 (A.C.) (U.K.).

227. *R. v. Human Fertilisation and Embryology Authority, ex parte Blood*, [1997] 2 WLR 806 (Q.B.D.) (U.K.).

start a family.²²⁸ Unfortunately, on February 26, 1995, Stephen contracted meningitis and lapsed into a coma.²²⁹ While still in a coma, on March 1, 1995, at Diana Blood's request, samples of Stephen's sperm were collected by electro-ejaculation for possible future use.²³⁰ The sperm was collected and entrusted to the Infertility Research Trust (IRT) for storage as required by the Human Fertilisation and Embryology Act of 1990 (the 1990 Act).²³¹ Stephen died shortly thereafter.²³² When Diana Blood subsequently wished to use the sperm samples for artificial insemination treatment, the Human Fertilisation and Embryology Authority (HFEA) in the U.K. refused to give the necessary consent for treatment, citing Section 4(1) and Schedule 3 of the 1990 Act.²³³ The relevant provisions require the written consent of a donor to the use of his sperm.²³⁴ In an initial application for judicial review of the decision of the HFEA, the judge, Sir Stephen Brown P. of the Queen's Bench Division, dismissed Diana Blood's application on grounds that Stephen did not consent to the use and storage of his gamete.²³⁵ On further appeal, the Court of Appeal held that, in the absence of the necessary consent from Stephen, Diana Blood's fertility treatment and the continued storage of her husband's sperm were prohibited by the relevant provisions of the 1990 Act.²³⁶ However, the Court of Appeal also held that, as a citizen of the European Community and pursuant to relevant EC Treaty, Diana Blood "had a directly enforceable right to receive medical treatment in another member state," and that the HFEA's refusal to authorize the export of her husband's sperm infringed this right insofar as it made impossible the fertilization treatment sought.²³⁷ Diana subsequently exported her husband's sperm and has since had two children conceived through artificial insemination.²³⁸

In *MAW v. Western Sydney Area Health Services*, decided on May 3, 2000, a court in Australia declined to consent to the removal of sperm from a man who was comatose and dying.²³⁹ The man in question had suffered severe brain damage as the result of an accident.²⁴⁰ While the man was on

228. *Human Fertilisation and Embryology Authority*, [1997] 2 WLR 806.

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *R. v. Human Fertilisation and Embryology Authority, ex parte Blood* [1996] 3 WLR 1176, 1181 (Q.B.D.) (U.K.).

236. *Id.* at 1190-91.

237. *Id.* at 1188.

238. Clare Dyer, *Diane Blood to Have Second Child*, THE GUARDIAN, Feb. 9, 2002, available at http://www.guardian.co.uk/uk_news/story/0,3604,647547,00.html.

239. *MAW v. Western Sydney Area Health Services*, (2000) 49 N.S.W.L.R. 231 (N.S.W.); No. BC200003155, 2000 NSW LEXIS 737, *47 (S.C. N.S.W. 2000).

240. *Id.*

life support, his wife brought an application seeking the court's permission for his semen to be extracted through a surgical procedure.²⁴¹ The Court declined, observing that such a procedure was neither for the protection nor welfare of the comatose patient.²⁴²

In the United Kingdom and many other Western countries, therefore, in deciding whether sperm can be retrieved from a comatose individual and whether the sperm so removed can be used subsequently, the decision turns primarily on whether the individual consented to such a procedure; ethics and morality are largely ignored.

C. POST-MORTEM RETRIEVAL AND INSEMINATION

While the retrieval of sperm from comatose patients is troubling, more troubling is the practice of retrieving sperm from dead bodies. In Australia and other Western countries, courts are grappling with the legality of the practice of retrieving sperm from dead men. *AB v. Attorney General of Victoria* involved an urgent application for authorization to retrieve sperm from a dead man.²⁴³ X, a young man of 29 years, died on Sunday, July 12, 1998, as a result of injuries from a motor vehicle accident.²⁴⁴ At 10:45 a.m. on Monday, July 13, 1998, X's wife (AB), acting through counsel, made an application seeking permission for the removal of semen from X's body.²⁴⁵ X did not leave a will, nor did he express any consent to the posthumous retrieval of his semen.²⁴⁶ Justice Gillard of the Supreme Court of Victoria granted permission for a "legally qualified medical practitioner to remove spermatozoa and associated tissue from the body of X" and for the spermatozoa and tissue so removed to be stored in accordance with the 1995 Infertility Treatment Act of Victoria.²⁴⁷ The time-sensitive nature of the procedure and the desire to have more time to consider the complexity of the case were the primary reasons given by the Court for granting the urgent petition.²⁴⁸ However, Supreme Court Justice Gillard ordered that, "[t]he spermatozoa and tissue so removed and stored are not to be used for

241. *Western Sydney Area Health Services*, (2000) 49 N.S.W.L.R. 231, *11.

242. *Id.* at *25 ("[O]perative procedures that are not necessary to preserve the life or ensure improvement or prevent deterioration in the physical or mental health or wellbeing of an incapable person are not able to be consented to by the Court under its *parens patriae* jurisdiction.").

243. *AB v. Attorney General*, No. 6553 of 1998, V.S. Ct. 180 (2005), available at <http://www.austlii.edu.au/au/cases/vic/VSC/2005/180.html>.

244. *Id.*

245. *Id.* The court papers simply referred to the deceased's widow as AB or the applicant and the deceased as Mr. C. In a judgment delivered on July 23, 1998, Gillard J. ordered that "[t]he proceedings proceed in the name of the applicant by the initial 'AB.'" The judge also prohibited until further order, "[t]he publication of the names of the applicant and her family and the deceased and his family or any other identifying information." *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

any purpose without a court order.²⁴⁹ The judge left open the question as to what use could be made of the semen so removed.²⁵⁰ AB ultimately lost a court battle to have her dead husband's baby, using the frozen sperm.²⁵¹ The Supreme Court refused to authorize the procedure on the grounds that her husband did not give his written consent to the procedure before he died.²⁵²

Justice Chesterman of the Supreme Court of Queensland came to a somewhat different conclusion in *Warren Andrew Gray*, decided October 12, 2000.²⁵³ In this case, Warren Andrew Gray, a 37-year-old man in apparent good health, unexpectedly died in his sleep between 10:00 p.m. on September 26, 2000, and 6:00 a.m. on September 27, 2000.²⁵⁴ Mr. Gray died intestate.²⁵⁵ His wife of six years (the applicant) wished at a later date to become pregnant by means of artificial insemination using semen that would be taken from her dead husband.²⁵⁶ The Monash IVF Queensland refused to perform the operation needed to remove the semen from the deceased without a court order.²⁵⁷ To extract semen from the deceased, surgical removal of a section of his testicles was required.²⁵⁸ Given the time-sensitive nature of the procedure, it was imperative that the tissue be removed by 10:00 pm on September 27.²⁵⁹ The applicant brought an urgent application to the court and the case was heard at 8:00 p.m. on September 27.²⁶⁰ Although acknowledging the need for the procedure to be urgently carried out, Justice Chesterman nevertheless denied the application even though the deceased had consented to the removal of his organs in the event of death and his next of kin, his father, had given his consent to the procedure.²⁶¹ Justice Chesterman noted that he found it difficult to identify any principle which would justify authorizing the procedure.²⁶² He opined that, "neither the widow nor the next of kin has a right to interfere with the body" of the deceased.²⁶³

249. AB, No. 6553 of 1998, V.S. Ct. 180 (2005).

250. *Id.*

251. *Id.*

252. *Court Denies Woman Right to Use Dead Husband's Sperm*, CBC NEWS, May 27, 2005, <http://www.cbc.ca/story/world/national/2005/05/27/australia-sperm050527.html>.

253. Warren Andrew Gray, (2000) 117 A. Crim. R. 22 (Austl.).

254. *Id.*

255. *Id.* at 24.

256. *Id.* at 23.

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.* at 24.

262. *Id.*

263. *Id.*

D. PPWS: A CRITICAL APPRAISAL

In the West, rapid change in medical technology is forcing the courts to grapple with issues that were unimaginable several decades ago. The problem arises because the law has not kept pace with technological changes. While it is hardly the business of the law what decision a woman makes about the use of her husband's sperm, problems arise and state interest is implicated when the man in question is dead. One person asked, "[w]hy should we discriminate against a woman who creates a fatherless child any more than a single mother who chooses to raise a child alone? If you can leave your assets in a will, why can't you leave behind a child, if that would have been your wish?"²⁶⁴ A deeper level of analysis is called for precisely because PPWS implicates many societal interests.

1. General Concerns

Judged through the prism of "other" cultures, artificial insemination in all its variations can be seen as unnatural and scandalous. In societies that view natural means of procreation to be morally normative or morally absolute, procreation by artificial insemination is repugnant to public policy and troubling at best. Most troubling, however, is the practice of retrieval of sperm and other tissue from the dead for purposes of artificial insemination — a novel practice in many countries.²⁶⁵ In Victoria, Australia, Section 43 of the Infertility Treatment Act of 1995 prohibits the insemination of a woman with sperm from a man known to be dead.²⁶⁶ However, pursuant to section 56 of the same Act, export and subsequent use of such sperm may be possible with the permission of the Infertility Treatment Authority.²⁶⁷ The 1996 version of the Ethical Guidelines on Assisted Reproductive Technology published by the National Health and Medical Research Council of Australia (NHMRC) listed among "[p]rohibited/unacceptable practices . . . [t]he use in ART treatment programs of gametes or embryos harvested from cadavers."²⁶⁸ Although these guidelines were rescinded, this early reluctance of the NHMRC to approve the practice of the use of semen harvested from cadavers is

264. *Life From Death*, Law Spot, Aug. 1998, <http://www.law4u.com.au/lil/life.html>.

265. Warren Andrew Gray, (2000) 117 A. Crim. R. 22, 23 (Austl.) (Chesterman J. observing that the issue of retrieval and storage of sperm from a dead man was "novel" and that "the exigencies of the situation meant that there was little time for research.").

266. Infertility Treatment Act 1995, Act. No. 63/1995 § 43 (Austl.). See also Belinda Bennett, *Posthumous Reproduction and the Meanings of Autonomy*, MELBOURNE U.L. REV. 286 (1999).

267. Infertility Treatment Act 1995, Act. No. 63/1995 § 56 (Austl.).

268. Ethical Guidelines on Assisted Reproduction Technology, National Health and Medical Research Council § 11.11 (1996), available at http://www.nhmrc.gov.au/publications/synopses/_files/e28.pdf.

telling.²⁶⁹ Regarding electroejaculation for retrieval of sperm from a dead man, Richard V. Grazi and Joel B. Wolowelsky question whether such a procedure could be allowed under Halakha ("traditional rabbinic Jewish law and ethics"), as it is forbidden to derive any personal benefit from a corpse.²⁷⁰

In some cultures, nothing is more unnatural and repugnant than the removal of body tissue from a dead body and the use of that for procreative purposes. PPWS (level 3) raises questions about public health and safety, the dignity and integrity of the dead, and the potential psychological impact on resulting children. Regarding public health, most cultures recognize that it is the obligation of the living to promptly bury their dead or otherwise properly dispose of the bodies. The prompt burial of the dead helps prevent foul smells and more importantly the spread of diseases. Common law does not recognize any property right in a corpse, nor any right to interfere with a dead body.²⁷¹ Questions also arise regarding the dignity of the corpse. Retrieval of sperm from a dead man involves the removal of sections of his testicles. It could be argued that removal of parts of the body of a deceased violates the dead — something frowned upon in many societies. Finally, questions arise regarding the rights of the dead. Although human rights are reserved for the living, it cannot seriously be argued that the dead have no interest to be protected.²⁷² Does posthumous conception advance the interest of the deceased? Should any significance be afforded the interest of the deceased? Would our answer depend on whether the deceased wished for or objected to posthumous procreation? Where a man did not indicate his consent to posthumous retrieval of his sperm, by what principal of law or ethics should such a procedure be carried out when he dies?²⁷³

Overall, Peter Dans is right in his assertion that "[r]eproductive technology raises fundamental questions about the nature of human relationships and what limits, if any, should be placed on human procreation."²⁷⁴ Although the thought of a bereaved widow attempting to

269. Ethical Guidelines, *supra* note 268 § 11.11.

270. Grazi & Wolowelsky, *supra* note 203.

271. ROHAN HARDCASTLE, LAW AND THE HUMAN BODY: PROPERTY RIGHTS, OWNERSHIP AND CONTROL 50 (Hart 2007).

272. Editorial, *Posthumous Conception and the Need for Consent*, 170 MED. J. AUSTL. 53, 53-54 (1999), available at <http://www.mja.com.au/public/issues/jan18/schiff/schiff.html> ("It is clear, though, that certain acts committed after a person's death can either harm or promote that individual's interests. For example, a posthumous event that destroys a deceased person's reputation harms his or her interests because it adversely affects the way that individual is remembered after death.").

273. Warren Andrew Gray, (2000) 117 A. Crim. R. 22, 28 (Austl.). Chesterman J. declined to give his consent to the surgical removal of the deceased sperm on the grounds that "[t]he deceased did not in his lifetime indicate his consent to such a procedure." *Id.*

274. Peter E. Dans, *Reproductive Technology: Drawing the Line*, 79 OBSTETRICS & GYNECOLOGY No. 2 191, 194 (1992).

keep the memory of her husband alive by harvesting his sperm for procreative purpose is touching, sympathy alone cannot inform law and public policy.²⁷⁵ In discussing the appropriateness of PPWS (level 3) several questions must be asked:

First, is it ethically and morally right to cause tissue or other bodily fluid to be removed from a dead man? Should the answer depend on whether or not the deceased gave prior consent?

Second, who should have the right to cause bodily fluids and tissue to be removed from the body of the deceased? Should this right be reserved for the surviving wife of a deceased, or can it be extended to girlfriends, significant others, parents, and other close surviving relatives?

Third, assuming the personal representative of the deceased has the right to cause bodily fluids and tissue to be removed from the body of the deceased, is there any limit to what the personal representative can do with the material so removed?²⁷⁶

Fourth, assuming it is ethically sound to remove sperm from a dead man, who can be impregnated with the retrieved sperm? The deceased wife? A girlfriend? Any willing woman?

Fifth, is there any danger that cryopreserved sperm will not be used within the context of a traditional marriage or as the only alternative to procreation within an anticipated marriage?²⁷⁷ In other words, is it possible that advancement in technology may lead to a situation where the natural method of procreation is subverted?

Finally, and most important, what is the long-term implication of PPWS on children born through the use of sperm from cadavers?

2. Posthumous Procreation and Children's Rights in the West

Posthumous procreation in the West implicates the rights and welfare of children on many fronts. First, unlike the case in Africa, the legal status as well as inheritance rights of posthumous children in the West are unclear at best and non-existent at worst. Second, the potential effect of posthumous procreation on the psychological wellbeing of resulting children has largely been ignored. Third, posthumous procreation may indirectly and seriously affect the decedent's surviving children who may

275. *Posthumous Conception and the Need for Consent*, *supra* note 272 (observing that sympathy alone should not inform law and public policy).

276. *AB v. Attorney General*, No. 6553 of 1998, V.S. Ct. 180 (2005), available at <http://www.austlii.edu.au/au/cases/vic/VSC/2005/180.html> ("I have indicated . . . that it may be appropriate to give more thought to the questions that have been raised in the proceeding, in particular, the question as to what use can be made hereafter of the semen of the deceased.").

277. Grazi & Wolowelsky, *supra* note 203 (observing that contemporary Jewish law and ethics (Halakha) welcomes the use of cryopreserved sperm to the extent that it is used within the context of a traditional marriage or as the only alternative to procreation within an anticipated marriage).

be confronted with new siblings or half-siblings at any time and without prior warning.

a. Uncertain Status and Inheritance Rights

In many countries, the legal status and inheritance rights of posthumous children are uncertain. While some countries grant inheritance rights to posthumous children expressly provided for in their parent's will, others do not. Louisiana, for example, expressly outlaws any inheritance rights for posthumous children.²⁷⁸ Under Louisiana law, a person can only inherit if he or she existed at the time of death.²⁷⁹ Posthumous children are thus disqualified from participating in both testate and intestate succession.²⁸⁰ The problem is compounded when there is no *inter vivos* planning for the interest of posthumous children. In the United States, current legislation is insufficient to deal with posthumous procreation. In the event that a man dies intestate, it would appear that any posthumous child born cannot inherit from his estate.²⁸¹ The new Uniform Parentage Act (UPA) (revised in 2000 and amended in 2002) sheds light on this problem.²⁸² Comment to Section 707 of the UPA states:

If an individual who consented in a record to be a parent by assisted reproduction dies before placement of eggs, sperm, or embryos, the deceased individual is not a parent of the resulting child unless the deceased spouse consented in a record that if assisted reproduction were to occur after death, the deceased individual would be a parent of the child.²⁸³

In essence, unless there is consent in a record, "the death of an individual whose genetic material is subsequently used either in conceiving an embryo or in implanting an already existing embryo into a womb ends the potential legal parenthood of the deceased."²⁸⁴ In *Woodward v. Commissioner of Social Security*, the Massachusetts Supreme Judicial Court, faced the following question:

If a married man and woman arrange for sperm to be withdrawn from the husband for the purpose of artificially impregnating the wife, and the woman is impregnated with that sperm after the man, her husband, has died, will children resulting from such pregnancy

278. See LA. CIV. CODE ANN. § 953 (2000); see also *id.* § 1474.

279. *Id.* § 953.

280. *Id.*

281. UNIF. PARENTAGE ACT § 707, cmt. (2002).

282. See *id.*

283. *Id.*

284. *Id.*

enjoy the inheritance rights of natural children under Massachusetts' law of intestate succession?²⁸⁵

The Court offered a heavily conditioned response. According to the Court:

In certain limited circumstances, a child resulting from posthumous reproduction may enjoy the inheritance rights of "issue" under the Massachusetts intestacy statute. These limited circumstances exist where, as a threshold matter, the surviving parent or the child's other legal representative demonstrates a genetic relationship between the child and the decedent. The survivor or representative must then establish both that the decedent affirmatively consented to posthumous conception and to the support of any resulting child. Even where such circumstances exist, time limitations may preclude commencing a claim for succession rights on behalf of a posthumously conceived child.²⁸⁶

Although a victory for posthumous children, *Woodward v. Commissioner of Social Security* presented a narrow set of circumstances. On the one hand, the Court did not agree with the government's position that, because posthumously conceived children are not "in being" as of the date of the parent's death, they are always barred from enjoying any inheritance rights.²⁸⁷ On the other hand, the Court did not adopt the wife's position that, "by virtue of their genetic connection with the decedent, posthumously conceived children must *always* be permitted to enjoy the inheritance rights of the deceased parent's children under [Massachusetts] law of intestate succession."²⁸⁸

In the United Kingdom, Section 28(6) of the Human Fertilisation and Embryology Act (1990) stipulates that:

Where — (a) the sperm of a man who had given such consent as is required by paragraph 5 of Schedule 3 to this Act was used for a purpose for which such consent was required, or (b) the sperm of a man, or any embryo the creation of which was brought about with his sperm, was used after his death, he is not to be treated as the father of the child.²⁸⁹

The result is that even when a man gives consent for his wife to use his sperm post-mortem, he will not be considered the legal father of any

285. *Woodward v. Comm'r of Soc. Sec.*, 760 N.E.2d 257, 259 (Mass. 2002).

286. *Id.*

287. *Id.* at 262.

288. *Id.* at 259.

289. Human Fertilisation and Embryology Act § 28 (1990), available at http://www.opsi.gov.uk/Acts/acts1990/ukpga_19900037_en.pdf.

resulting offspring.²⁹⁰ The inheritance and succession rights of posthumous children are thus not guaranteed. Therefore, no legal relation with the father and the dead father's relatives (e.g., grandmothers and grandfathers) may be presumed. Under existing laws in the United States, for example, a posthumous child cannot assume that his dead father's mother is his grandmother.²⁹¹

The uncertainty surrounding the inheritance rights of posthumous children raises serious issues under the non-discrimination clause of the CRC, which prohibits discrimination against children on the basis of the circumstances of their birth.²⁹² Quite unlike the situation in Africa where posthumous children are readily accepted into the extended family network, in the West, it is not certain which persons a posthumous child can claim as a relative.²⁹³ Children are thus born into a relational vacuum.

b. Psychological Well-Being of Posthumous Children

One of the strongest arguments against posthumous retrieval and use of sperm is the effect of this practice on children who are born as a result of the procedure. Can it be argued seriously that the practice, if allowed, advances the interests of children in any way?²⁹⁴ Posthumous children, even before they are conceived, face what Justice Higgins in the Australian case of *Warren Andrew Gray* aptly referred to as a life of "inevitable fatherlessness."²⁹⁵ Sometimes, all that a posthumous child may get from a dead father is a letter from the grave. In the California case of *Hecht v. Superior Court*, prior to committing suicide, Mr. Kane (the deceased) left a most unusual letter to any resulting posthumous child.²⁹⁶ He wrote: "I have loved you in my dreams, even though I never got to see you born. If you are receiving this letter, it means that I am dead — whether by my own hand or that of another makes very little difference. I feel that my time has come; and I wanted to leave you with something more than a dead enigma that was your father."²⁹⁷

Very little thought has been given to how the psychological well-being of posthumous children may be affected and protected. There are many unknowns at this point. In *Andrew Warren Gray*, Justice Higgins observed:

290. Human Fertilisation and Embryology Act § 28 (1990), *available at* http://www.opsi.gov.uk/Acts/acts1990/ukpga_19900037_en.pdf.

291. *See* UNIF. PARENTAGE ACT, *supra* 281, § 204(a)(2).

292. Convention on the Rights of the Child, *supra* note 136, at art. 2.

293. *See* UNIF. PARENTAGE ACT, *supra* 281, § 204(a)(2).

294. *Posthumous Conception and the Need for Consent*, *supra* note 272 ("Might the child be adversely affected by being knowingly denied access to one biological parent?").

295. *Warren Andrew Gray*, (2000) 117 A. Crim. R. 22, 29 (Austl.).

296. *Hecht v. Superior Court*, 20 Cal. Rptr. 2d 275, 277 (1993) (depublished).

297. *Id.*

The very nature of the conception may cause the child embarrassment or more serious emotional problems as it grows up. More significant, because the court can never know in what circumstances the child may be born and brought up, it is impossible to know what is in its best interest.²⁹⁸

Even if one may not fully agree with Judge Higgins, it has to be admitted that the potential risks to children of ART, combined with the absence of a father, warrants care in the way society approaches posthumous procreation.

c. Rights of the Decedent's "Other" Children

How might posthumous conception and reproduction affect the emotional, psychological, and financial well-being of a deceased's preexisting children? Undoubtedly, posthumous procreation can have enduring consequences on the living and may jeopardize the welfare and development of surviving children. In *Woodward v. Commissioner of Social Security*, the Massachusetts Supreme Court observed that, where a man died intestate, awarding inheritance rights to posthumous children could seriously undermine the rights and interests of the decedent's pre-existing children.²⁹⁹ According to the Court:

In the context of our intestacy laws, the best interests of the posthumously conceived child, while of great importance, are not in themselves conclusive. They must be balanced against other important State interests, not the least of which is the protection of children who are alive or conceived before the intestate parent's death. In an era in which serial marriages, serial families, and blended families are not uncommon, according succession rights under our intestacy laws to posthumously conceived children may, in a given case, have the potential to pit child against child and family against family. Any inheritance rights of posthumously conceived children will reduce the intestate share available to children born prior to the decedent's death.³⁰⁰

In *Hecht v. Superior Court*, the decedent's adult children, William Everett Kane, Jr. and Katherine Kane, sought to prevent the petitioner, Deborah Ellen, from conceiving a child using their deceased father's sperm.³⁰¹ Prior to his death, William Kane had deposited a total of fifteen

298. Warren Andrew Gray (2000) 117 A. Crim. R. 22, 29 (Austl.).

299. *Woodward v. Comm'r of Soc. Sec.*, 760 N.E. 2d 257, 259 (Mass. 2002).

300. *Id.*

301. *Hecht*, 20 Cal. Rptr. 2d at 276; *Hecht v. Superior Court*, 59 Cal. Rptr. 2d 222, 223 (1996).

vials of his sperm at a sperm bank.³⁰² The Court found that there was abundant documentary evidence of decedent's intent that the sperm vials were for the sole purpose of Hecht's use in conceiving and birthing their child.³⁰³ The decedent's children got to know of the possibility of a future sibling for the first time after the death of their father through a letter dated October 21, 1991.³⁰⁴ In a letter addressed "To my Children" and intended to be read after his death, the decedent wrote:

I address this to my children, because, although I have only two . . . it may be that Deborah will decide — as I hope she will — to have a child by me after my death. I've been assiduously generating frozen sperm samples for that eventuality. If she does, then this letter is for my posthumous offspring, as well . . .³⁰⁵

The Court concluded that Deborah Hecht was entitled to the fifteen vials of sperm deposited by Hecht prior to his death.³⁰⁶ According to the Court:

[There] has never been a dispute over whether women shall be allowed to produce children through sperm donated by now dead fathers. Under current law and technology Hecht could have gone to this same cryobank and obtained sperm from an anonymous donor, including one who is no longer alive. All we decided was her entitlement to the sperm of a particular donor, the man she had loved and lived with for five years. It became an issue only because of an unusual, and perhaps unique, configuration of personalities and motivations. Unfortunately, it also took three years of litigation and three trips to this court to finally resolve the question.³⁰⁷

The Court did not decide the thornier issue of the inheritance right of any child that may result from Deborah's use of the sperm and how the inheritance right of such a child may conflict with the inheritance right of William Kane's surviving children.³⁰⁸ According to the Court, "[w]e do not have before us the many legal questions raised by the possible birth of a child to Hecht through use of Kane's sperm. Thus, we do not decide, for instance, whether that child would be entitled to inherit any property as Kane's heir."³⁰⁹ In his concurring opinion, Justice Woods noted that posthumous procreation may implicate

302. *Hecht*, 20 Cal. Rptr. 2d at 276.

303. *Hecht*, 59 Cal. Rptr. 2d at 223.

304. *Hecht*, 20 Cal. Rptr. 2d at 277.

305. *Id.*

306. *Hecht*, 59 Cal. Rptr. 2d at 227.

307. *Id.*

308. *Id.*

309. *Id.* at 228.

some state interest and called upon the legislature to intervene.³¹⁰ According to Justice Woods:

[I]t is far more in keeping with the function of the legislature to explore what legislation might be needed to regulate gametic donations. Courts are poorly equipped to address such an issue. I encourage the legislature to immediately embark upon fixing a policy by legislation which will regulate and define the permissible parameters of gametic donations by individuals in this state.³¹¹

In conclusion, in the United States and other Western countries, developing reproductive technology has outpaced legislation with the effect that in many countries, existing laws do not directly address the legal issues created by posthumous conception.³¹² In the absence of specific legislation on the subjects, courts have adopted an intent-based approach to the issue.³¹³ In effect, the intent of the donor is treated as the primary factor in determining whether to allow posthumous insemination.³¹⁴ The intent-based approach is, however, problematic on many levels. First, the intent of the donor could adversely affect the interests of the living as in the case of a decedent's surviving children. Second, the intent of the donor may be irresponsible, for example, if the donor requests that a bank release his sperm to fifty different women in order to maximize his chances to procreate. As Aziza-Shuster rightly notes, there is nothing that stops a donor from bequeathing his spermatozoa "to impregnate his daughter or his mother, or even a gorilla."³¹⁵ In short, the intent-based approach is ultimately unhelpful in addressing the deep ethical and moral issues raised by posthumous procreation because, besides the deceased and a grieving widow, there are many other compelling interests implicated by the practice.

310. *Hecht*, 59 Cal. Rptr. 2d at 229. As stated by Justice Woods:

Although I possess a good dose of Orwellian caution when it comes to governmental interference in such intimate matters as the *Hecht/Kane* arrangement in this instance, I am not convinced that the state as an entity is devoid of "any" sufficient interest to justify interference in such matters. I would caution that our initial opinion and this opinion should not be construed beyond the facts of the instant matter. It is beyond the capacity of this court to speculate on all of the consequences that might be spawned should our initial opinion and the opinion herein be construed too broadly.

Id. (Wood, J., concurring).

311. *Id.*

312. *Gillett-Netting v. Barnhart*, 371 F.3d 593, 595 (9th Cir. 2004).

313. *Hecht*, 59 Cal. Rptr. 2d at 227.

314. *Id.*

315. Aziza-Shuster, *supra* note 207, at 2184.

VII. CONCLUSION

Is there a right to procreate? Is there a right to an heir? The idea and practice of posthumous procreation is ancient.³¹⁶ Given the fundamental need, if not right, to procreate, societies have from "time immemorial" created mechanisms to overcome the frustration of procreation as a result of infertility and premature male death.³¹⁷ PPAS and PPWS are essentially different approaches to the same basic problem of the "absoluteness of physical death." Posthumous procreation finds justification in the need for social continuity.

Posthumous procreation in Africa is somewhat comparable to posthumous procreation in the West and very comparable to the practice of artificial insemination of a married woman by a male donor's sperm. Posthumous procreation in Africa and the West involve continued contact with the dead by the living. PPAS differs from PPWS to the extent that with respect to the latter, there are linkages created by the dead man's sperm and the genetic material it contains. Whereas with PPAS, there is no genetic linkage between the dead man and any children attributable to him. In Africa, poverty and the lack of access to modern technology makes it impossible to procreate noncoitally using a decedent's sperm, as is done in the West today. Nevertheless, in Africa as well as the West, the effect of posthumous reproduction is "the dislocation of reproductive events."³¹⁸ In both Africa and the West, posthumous procreation "raises important questions about marriage, paternity, and mortality," and fundamentally challenges "the normative structures or values of family and kinship."³¹⁹

In Africa as in the West, biology does not always determine parentage. For example, in the West, when a married woman is artificially inseminated by a male donor's sperm, the husband, not the male donor, is deemed the legal father of the resulting child.³²⁰ Indeed, legislation is sometimes carefully crafted to protect the sperm donor from any obligations of parenthood and to protect the donee from any future claim of rights to parenthood by the donor. For example, Section 702 of the Uniform Parentage Act provides that "[a] donor is not a parent of a child conceived by means of assisted reproduction."³²¹ Under the UPA, donors are completely eliminated from the parental equation and can neither sue to establish parental rights nor be required to support the resulting child.³²²

316. Bob Simpson, *Making 'Bad' Deaths 'Good': The Kinship Consequences of Posthumous Conception*, 7 J. ROYAL ANTHROPOLOGICAL INST. 1, 1-18 (2001).

317. *Id.* at 1.

318. Simpson, *supra* note 316, at 13.

319. *Id.*

320. See, e.g., UNIF. PARENTAGE ACT, *supra* note 281, § 204.

321. *Id.* § 702.

322. *Id.*

In evaluating Africa's approach to posthumous procreation, it must be remembered that artificial insemination as practiced in the West today was once frowned upon in many Western countries. One such example is the 1921 case of *Oxford v. Oxford* in which the court equated artificial insemination with adultery, observing that the essence of adultery was "not in the moral turpitude of the act of sexual intercourse, but in the voluntary surrender to another person of the reproductive powers or faculties."³²³

The repugnancy test invoked during the colonial period in Africa was a clear reflection of the ethnocentric bias in legal systems in Africa. In contemporary Africa, the repugnancy test has gained a new lease of life in the hands of a judiciary determined to promote human rights. Unless carefully deployed, international human rights norms will not fare any better in contemporary Africa. Admittedly, it is difficult to analyze and compare practices that are rooted in different societies. However, it is culturally imperialistic for human rights bodies such as the CEDAW Committee to condemn practices that are embedded in non-Western cultures while ignoring arguably comparable practices in the West. Regarding posthumous procreation in general, a comprehensive and genuinely universal approach to human rights work is called for — an approach that requires communication within and among cultures. Africans are faced with the challenge of reforming customary laws and practices that seriously threaten public health and safety, are obsolete, and otherwise implicate fundamental rights of women and children. In the West, where rapidly expanding medical technology makes noncoital posthumous conception and reproduction possible, many complex and troubling issues also arise which cannot be ignored. Faced with vast advances in medical technology, should the law adapt to accommodate posthumous conception and reproduction in all its many varieties?³²⁴

Customary law is not static but has a tendency to change, albeit slowly. In the 1908 case of *Lewis v. Bankole*, Justice Osborn rightly observed that: "[o]ne of the most striking features of West African native custom . . . is its flexibility; it appears to have been always subject to motives of expediency, and it shows unquestionable adaptability to altered circumstances without entirely losing its character."³²⁵ Additionally, in the 1976 case of *Ejanor v. Okonome*, the cautionary note of the learned judge rings true today. He cautioned: "I think we must not be in a hurry . . . to condemn the old and established customary law of the people . . . where the people have all

323. HARI DEV KOHLI, LAW AND ILLEGITIMATE CHILD 35 (Anmol Publications Pvt. Ltd. 2003) (citing *Oxford v. Oxford*, [1921] 58 O.L.R. 251 (Can.)).

324. Warren Andrew Gray, (2000) 117 A. Crim. R. 22,29 (Austl.) (Higgins, J., dissenting) ("As science progresses the law will obviously face frequent challenges for which there may be no adequate precedent . . .").

325. *Yusuff v. Dada et al.*, [1990] 7 N.I.L.R. 13 (Nig.) available at <http://www.nigeria-law.org/LawReporting.htm> (citing *Lewis v. Bankole*, [1908] 1 N.L.R. 81, 100-01 (Nig.)).

along regulated their lives by that custom."³²⁶

Posthumous procreation in all its variations is about adults exercising their rights to found a family. Procreative autonomy, according to Ronald Dworkin, is "a right (of people) to control their own role in procreation unless the State has a compelling reason for denying them that control."³²⁷ Very little attention has been paid to the interest of the resulting children.³²⁸ Would such children be better off not being born? Is Harris really correct in his assertion that it is better to exist than not to exist?³²⁹ There is a need to pay closer attention to how the rights and welfare of the children may be affected and how these rights could be adequately safeguarded. There is urgent need to investigate posthumous procreation and conduct human rights work in this area from both the perspective of "we" and "others," "westerners" and "non-westerners," "insiders" and "outsiders." As aptly noted by one commentator:

Contemporary human rights work and talk mask fundamental assumptions about how human society is organised. In reality, there is a natural variety to how human society is organised, and, therefore, to how human rights are understood and experienced in different societies. These differences should necessitate a humble and informed cross-cultural dialogue about human rights. Non-formal systems of social organisation have long received the attention of anthropologists as some kind of exotic field of interest. Yet, they constitute a substantial part of that majority of the human community that exists outside the actual authority of the state sector, on whom the credibility of contemporary human rights protection is hinged. There is much that the human rights movement can learn from and give to norms and structures evolved in these settings.³³⁰

326. Asiedu-Akrofi, *supra* note 55, at 585-86.

327. RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION AND EUTHANASIA* 148 (Harper Collins 1993).

328. See SELECT COMMITTEE ON SCIENCE AND TECHNOLOGY, *supra* note 148 (observing that in discussions about ART, there is no mention that children are the result of assisted human reproduction).

329. John Harris, *Rights and Reproductive Choice*, in *THE FUTURE OF HUMAN REPRODUCTION: ETHICS, CHOICE, AND REGULATION* 5, 21 (John Harris and Søren Holm eds., Oxford Univ. Press 1998).

330. Odinkalu, *supra* note 132, at 13.